* Together with Sachs v. United States No. 718

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No. 715

In the
Supreme Court of the United States
OCTOBER TERM, 1967.

S. LAWRENCE KAHN, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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S. LAWRENCE KAHN,

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vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices Of The Supreme Court of the United States:

Your petitioner, S. Lawrence Kahn, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the above Case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in case No. 64 Cr. 267 was entered on March 11, 1966 and is not reported, but appears in the record filed with and

certified by the Clerk of the Court of Appeals and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment was filed June 29, 1967, and is not yet reported, but is set forth in the Appendix hereto and in the certified copy of the record as number 15665, 15666 and 15667 as of that date. The defendants-appellants in cases Nos. 15666 and 15667 were co-defendants in the case in the District Court. The cases were consolidated in the Court of Appeals for the Seventh Circuit.

JURISDICTION

On September 12, 1967, the Court of Appeals denied a Petition for Rehearing En Banc (this order appears in the Appendix of this Petition). This Petition is filed within thirty days of the denial of the said Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Should not the petitioner's motion for dismissal of the indictment have been granted for failure of any of the counts of the indictment to charge a criminal offence. The "misapplication" counts drawn under Sections 656 and 657, Title 18, U. S. C. are void for failure to allege that any of the "misapplied" funds were converted to the use of the defendants or some other person. Count One, the conspiracy count, is void because it does not set forth in the charging portion the essential element of a connection between the alleged conspirators and the financial institutions involved.

2. Was not the petitioner Kahn's right to a fair trial prejudiced by the failure of the trial court to grant him a severance when it became apparent that the defenses of his co-defendants, who had been his lawyers in the transactions involved were in conflict with his defense and that the circumstances surrounding their testimony and the instructions given by the trial court concerning this testimony resulted in great prejudice to him.

STATEMENT OF THE CASE

A. THE INDICTMENT

In its original posture the indictment No. 64 CR 267 (App. 1) was in eighteen counts, the first count of which charged the defendant-appellant, S. Lawrence Kahn, and Arthur B. Sachs, Thomas E. Joyce and M. Prial Curran with participating in a conspiracy with Edward Ferrari and Mary Jean Burleson, named as co-conspirators but not as defendants, commencing on or about July 1, 1962 and continuing to the date of the return of the indictment of violations of Sections 656, 657, 1001, 1005 and 1006 of Title 18, United States Code, that is to say, conspiring to misapply for their own personal gain monies and funds of the Chatham Bank of Chicago, the Leyden Savings & Loan Association, Equitable Savings & Loan Association, Property Federal Savings & Loan Association and George Washington Savings & Loan Association, the deposits of which were insured by the Federal Deposit Insurance Corporation or the Federal Savings & Loan Insurance Corporation.

Count II charged Thomas E. Joyce, as a principal, and S. Lawrence Kahn the defendant-appellant herein as an aider and abettor, with misappropriating funds of the Property Federal Savings & Loan Association in violation of Section 657, Title 18, of the United States Code.

Count III charged S. Lawrence Kahn and Arthur B. Sachs, as principals and M. Prial Curran as an aider and abettor with misappropriating funds of the Chatham Bank of Chicago in violation of Section 656, Title 18, of the United States Code.

Count IV charged S. Lawrence Kahn and Arthur B. Sachs as principals and Thomas E. Joyce as an aider and abettor with misappropriating monies of the Property Federal Savings & Loan Association in violation of Section 656, Title 18, United States Code.

Count V charged S. Lawrence Kahn and Arthur B. Sachs as principals with misappropriating monies of the Leyden Savings & Loan Association in violation of Section 657, Title 18, United States Code.

Count VI charged S. Lawrence Kahn and Arthur B. Sachs as principals with misappropriating monies of the Leyden Savings & Loan Association in violation of Section 1006, Title 18, United States Code.

Count VII charged S. Lawrence Kahn and Arthur B. Sachs as principals with misappropriating monies of the Chatham Bank of Chicago in violation of Section 656, Title 18, United States Code.

Count VIII charged S. Lawrence Kahn and Arthur B. Sachs as principals with misappropriation of monies of the Leyden Savings & Loan Association in violation of Section 657, Title 18, United States Code.

Count IX charged the defendant, S. Lawrence Kahn, and Arthur B. Sachs with misappropriation of monies of the Leyden Savings & Loan Association in violation of Section 1006, Title 18, United States Code.

Count X charged S. Lawrence Kahn and Arthur B. Sachs with misappropriation of monies of the Leyden

Savings & Loan Association in violation of Section 657, Title 18, United States Code.

Count XI charged the defendant, S. Lawrence Kahn and Arthur B. Sachs with misappropriation of monies of the Leyden Savings & Loan Association in violation of Section 1006, Title 18, United States Code.

Count XII charged Arthur B. Sachs and M. Prial Curran as principals and S. Lawrence Kahn as an aider and abettor with misappropriating monies of the Equitable Savings & Loan Association in violation of Section 1006, Title 18, United States Code.

Count XIII charged Arthur B. Sachs and M. Prial Curran as principals and S. Lawrence Kahn as an aider and abettor with misappropriating monies of the Equitable Savings & Loan Association in violation of Section 657, Title 18. United States Code.

Count XIV charged Arthur B. Sachs and M. Prial Curran as principals and S. Lawrence Kahn as an aider and abettor with misappropriating monies of the Equitable Savings & Loan Association in violation of Section 657, Title 18, United States Code.

Count XV charged Arthur B. Sachs and M. Prial Curran as principals and S. Lawrence Kahn as an aider and abettor with misappropriating monies of the Equitable Savings & Loan Association in violation of Section 1006, Title 18, United States Code.

Count XVI charged Arthur B. Sachs and M. Prial Curran as principals and S. Lawrence Kahn as an aider and abettor with misapplying monies of the Equitable Savings & Loan Asso ation in violation of Section 657, Title 18, United States Code.

Count XVII charged Arthur B. Sachs and M. Prial Curran as principals and S. Lawrence Kahn as an aider and abettor with misapplying monies of the Equitable Savings & Loan Association in violation of Section 1006, Title 18, United States Code.

Count XVIII charged Arthur B. Sachs alone with misapplying monies of the Equitable Savings & Loan Association in violation of Section 1001, Title 18, United States Code.

Prior to trial, on motion Counts V, VI, VIII, IX, X and XI were dismissed as to the defendant, S. Lawrence Kahn, for failure to charge a crime as to him. Prior to the conclusion of the trial Counts XII, XIII, XIV and XV were dismissed as to all defendants. After the selection of the jury and opening statements having been made, with leave of Court the defendant Joyce entered a plea of guilty as to Count IV. At this time Count I was dismissed as to Joyce and Count II was dismissed, which named only Joyce and Kahn as defendants.

After this action motions for mistrial, as to the other defendant were denied.

Count XVIII was dismissed as to the defendant Sachs before the case was submitted to the jury.

On January 6, 1966 the defendant Kahn was found guilty on Counts I, III, IV, VII, XVI and XVII. The defendant Sachs was found guilty on Counts I, III, IV, VII, VIII, IX, X, XI, XVI and XVII. The defendant Curran was found guilty on Counts I, III, XVI and XVII.

Prior to trial, after the granting of the defendant Kahn's motion to dismiss Counts IV, V, IX, X and XI, appropriate motions for severance and dismissal were made and denied. A motion prior to trial to compel the

Government to elect to prosecute Count I, the conspiracy count, or to prosecute the remaining substantive counts as to the defendant, S. Lawrence Kahn, was made and denied. During the period of the indictment the defendant-appellant S. Lawrence Kahn was charged as the Vice President and a member of the Board of Directors of the Chatham Bank and Arthur B. Sachs and M. Prial Curran as attorneys or members of the Board of Directors of the various institutions named.

B. THE EVIDENCE

The evidence showed that Kahn was a builder and real estate developer from Indiana (Tr. 2954-55). That Sachs and Curran were lawyers that specialized in corporate and real estate law, and that Thomas Joyce was a lawyer for one of the savings and loan institutions named in the indictment. In 1962 Kahn attempted to obtain, with others, controlling interest in the Chatham Bank of Chicago. Sachs and Curran represented Kahn and as a result were retained as attorneys for the bank. The evidence then concerned itself with certain loans by Chatham (Counts 3-4-7), one to a Kahn-controlled company which was repaid (Tr. 300, 1328, 1222-23) and two loans made to purchase control of the Leyden Savings & Loan Association (Tr. 98, 103, 108, 157). These loans it was charged were in violation of Section 656, 18 U.S.C.

Then evidence was introduced to support the alleged violations of Sections 657 and 1006, 18 U.S.C., in connection with transactions that occurred at the Leyden Savings & Loan Association. The counts concerning these transactions had, as has been stated, been dismissed as to Kahn, but over objection evidence was received as to these transactions totaling almost $1,000,000 of Leyden's funds. Later, almost $800,000 of this money was repaid to Leyden by Kahn (Tr. 527, 1247-48, 1399 and 2911).

Further evidence was permitted to be introduced relating to loans made by the Equitable Savings & Loan Association of Chicago, a state savings and loan institution, to various companies allegedly operated by Kahn but connected to him by evidence of a tenuous nature as spelled out by witnesses, Mary Burleson and her husband, both of whose testimony was impeached. The evidence showed that defendants Sachs and Curran were attorneys for Equitable but shows no direct connection of the defendant Kahn with this institution.

During the course of the trial both the defendants Sachs and Curran repeatedly sought their dismissal or severance from the defendant Kahn because of a pretrial collateral issue, which is raised by them, which this defendant contends so prejudiced the trial as to him that he should have been dismissed or severed from the case, in order that he, the defendant Kahn, would receive the fair, unprejudiced trial to which he was entitled.

STATUTES INVOLVED

18 U.S.C. 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined * * * or imprisoned * * * or both. * * *"

18 U.S.C. 656:

> "Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve Bank, member bank, national bank or insured bank, * * * willfully misapplies any of

the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank * * * shall be fined * * * or imprisoned * * * or both. * * *"

18 U.S.C. 657:

"Whoever, being an officer, agent or employee of or connected in any capacity with * * * any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation * * * willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined * * * or imprisoned * * * or both."

18 U.S.C. 1006:

"Whoever, being an officer, agent or employee of or connected in any capacity with * * * any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, * * * with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly

or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined * * * or imprisoned * * * or both."

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals in sustaining the sufficiency of the "misapplication" counts in the indictment and the conspiracy count has decided important federal questions in a way in conflict with applicable decisions of this Court, of its own Seventh Circuit Court of Appeals and of Courts of Appeal of other Circuits.

2. The Court of Appeals has departed from the accepted and usual course of judicial proceedings relative to the admission of evidence, the right to severance and to proper instructions to the jury and has sanctioned such a departure by the District Court in violation of the petitioner's rights under the VI Amendment to the Constitution so as to call an exercise of this court's power of supervision.

ARGUMENT

1. That the indictment was inartistically drawn was apparent from the outset when the Trial Court dismissed Counts V, VI, VIII, IX, X and XI as to your petitioner for failure to charge a crime. The Court of Appeals in its opinion followed the Government's suggestion in its brief that the three counts drawn under Sec. 1006, Title 18, U. S. C. the so-called "participation" counts were void under its decision in *United States* v. *Quinn*, 7 cir., 365 F 2nd 256 (1966), (Slip Opinion, p. 2, footnote 1, App. 2A).

Your petitioner contends that if the *Quinn* case governs, all counts in the instant indictment must fall save Count I (treated later in this petition). This petitioner was found guilty as a principal on Counts III, IV and VII purporting to charge an offense under Section 656, 18 U. S. C., and Count XVI as an aider and abettor to a purported violation of Section 657, 18 U. S. C.

There is no allegation in any of the "misapplication" counts that the funds were converted to the use of anyone. The law is well-settled that an actual conversion of the funds is an element of the crime under Sections 656 and 657, 18 U.S.C. *United States* v. *Britton*, 107 U.S. 655, *Mulloney* v. *United States*, 79 F.2d 566 (1st Cir.), *U.S.* v. *Quinn* (7th Cir.) *supra*.

The Court's attention is directed to the recent decision of this Court in *Russell* v. *United States*, 369 U.S. 749, 765, which held an indictment fatally defective although drawn in statutory language:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it

> be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.'"

The Court of Appeals in *Quinn* held that the defectiveness of the two "participation" counts alone required reversal. Here however the same Court, albeit a different panel, did not do so, although it apparently assumed that the three "participation" counts were void. The Court here has applied a different test than that used in *Quinn* to sustain the "misapplication" counts and does in the opinion of your petitioner still leave them defective. The result is that in this opinion the Court of Appeals for the Seventh Circuit is not only in conflict with this Court but is in conflict with itself and with Courts of Appeal of other Circuits.

Count I, the conspiracy count sought to charge that your petitioner along with others conspired to violate sections 656, 657, 1001, 1005, and 1006 of 18 U. S. C. an essential element of the crimes defined by all of these sections (except for 1001) is that the defendant must be an officer, director, agent or employee of, or connected in any capacity with "a federally insured institution." Count I, however made no allegation whatsoever that any of the alleged conspirators were connected in any way with any of the named institutions or in any of the stated capacities. The failure to aver this essential element renders the conspiracy count null and void.

The only substantive count based on Section 1001, was dismissed by the government and there was no evidence to prove any violation or conspiracy to violate this section.

To justify the validity of the conspiracy count the Court in its opinion has to reach out and include three of the overt acts alleged. Appellant does not quarrel with the principle that all elements of a conspiracy need not be precisely stated but does contend that the rule of law must be sustained that holds that they must be stated in some form, and to call attention to the Court of the deficiencies in the indictment is not an attempt to pervert. *Pettibone* v. *United States,* 148 U.S. 197; *Brenner* v. *United States,* 287 F. 636 (2nd Cir.). It seems patent that the conspiracy count does not satisfy the critical prerequisite of averring the necessary corporate position of one or more of the defendants required to violate the law, and to state an offense in this court.

The Court of Appeals of Seventh Circuit in its opinion has sustained a conspiracy count by allowing the overt act allegations to be utilized to supply the omission of an essential element of the charge (slip opinion, pp. 5-6, App. 5a-6a). This departure from existing precedents requires the granting of this petition. *United States* v. *Deutsch,* 243 F. 2d 435 (2nd cir., 1957); *United States* v. *Knox Coal Company,* 347 F. 2d 33 (3rd cir., 1965); *Hamner* v. *United States,* 134 F. 2d 592 (5th cir., 1943).

2. It was apparent from the outset of the trial and was abundantly demonstrated during its course that the defense of the co-defendants Sachs and Curran was inconsistent with that of the Petitioner Kahn. Although appreciating this in its opinion (Slip opinion p. 23, App. 20a) the Court of Appeals resorts to the highly unsatisfactory conclusion that the question was one of discretion and the trial court did not abuse it.

Kahn's dilemma was, Sachs and Curran were his attorneys in most of the transactions, Sachs and Curran had made pretrial statements to the Federal Bureau of

Investigation which caused (a) the raising of a collateral issue as to their use for impeachment and (b) the giving of long and confusing instructions which although objected to on behalf of all defendants were given. Sachs and Curran testified and Kahn did not. During the course of the trial your petitioner constantly sought a severance. The Court of Appeals in its opinion "hewed to the line" of not recognizing "prejudice" as a two way street and approved the trial court's ruling as approved by the Court of Appeals contrary to the findings of reviewing Courts. *Krulevitch* v. *United States,* 336 U.S. 440, *United States* v. *Wortman,* 326 F. 2d 717, (7th Cir.), *United States* v. *Borelli,* 336 F. 2d 376, *United States* v. *Haupt,* 136 F. 2d 661 (7th Cir.), *Schaffer* v. *United States,* 221 F.2d 833 (5th Cir.).

The Petitioner Kahn offered the following instruction which was refused by the trial court:

Defendant Kahn's Instruction 30-A

There has been evidence that the defendant Kahn sought out and relied upon the legal advice of attorneys in performing the acts which are charged in this indictment.

You are instructed that the defendant Kahn was entitled to act in good faith upon the advice of the attorneys whether or not such advice was correct as a matter of law.

Unless you find from the evidence beyond a reasonable doubt that the defendant Kahn was not acting upon such legal advice and in good faith, then you must find the defendant Kahn not guilty as to each and every count in which he is charged in this indictment. (Refused)

The Court in its slip opinion (p. 25) states that the refusal of the trial court to instruct the jury to acquit Kahn if it believed he was acting according to the advice of his counsel was not error because there was no evidence to support this theory. The very first page of the opinion in discussing the facts describes Sachs and Curran as attorneys for Kahn, and the record showed that Kahn, a realtor and builder, went into the banking business, and that in the transactions involved in the indictment had the counsel of Sachs and Curran.

It is the considered opinion of the petitioner that the Court erred in attempting to shift to Kahn a theory of defense that was developed on examination of witnesses that he had the duty of full disclosure. The law with regard to this instruction it is believed was properly stated in *United States* v. *Indian Trailer Corp.*, 226 F.2d 595 (7th Cir. 1955), and *Perez* v. *United States*, 297 F.2d 12 (5th Cir.), where it was held that only slight evidence was sufficient to justify the giving of an instruction on the defendant's theory of the case.

Dispositive of this issue it is represented is the recent decision of the Fifth Circuit in *Strauss* v. *United States*, 376 F.2d 416, (April 24, 1967) wherein it was stated at page 419,

> "It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in evidence." *Perez* v. *United States*, 5 Cir. 1961, 297 F.2d 12, 13-14. (emphasis added)

We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense. The judge is a law-giver. He decides whether the facts constituting the defense framed by the proposed

charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD E. GORMAN
Attorney for the Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1966 — APRIL SESSION, 1967

Nos. 15665, 15666 and 15667
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
S. LAWRENCE KAHN, ARTHUR B. SACHS and M. PRIAL CURRAN,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 29, 1967

Before HASTINGS, *Chief Judge,* and SWYGERT and FAIRCHILD, *Circuit Judges.*

HASTINGS, *Chief Judge.* We consider separate appeals by S. Lawrence Kahn, Arthur B. Sachs and M. Prial Curran from their convictions, following a jury trial in the district court, upon jury verdicts of guilty.

Kahn, and Sachs and Curran, attorneys for Kahn, were indicted with others as conspirators in a scheme to illegally use moneys of a number of federally insured banks and savings associations for their personal benefit. In addition to the conspiracy count, the defendants were charged in a number of other counts as principals or as aider-abettors

in illegally misapplying funds deposited in federally insured institutions.[1]

Kahn and Sachs were each sentenced to serve five years on a number of separate counts of the indictment, the sentences to run concurrently. Curran was sentenced to two years on each of a number of counts, the sentences to run concurrently.

The sufficiency of the evidence is not challenged. Since we are not required to review the evidence for its sufficiency, only the essential nature of the Government's case need be shown.

The evidence put on by the Government, which the jury could have believed, tended to show that this was a case of untrustworthy men in trust; of loans without security, mortgages without property, checks without funds; of grossly unrealistic appraisals of real estate; of emptied banks acquired for their tills; of furtive manipulation and deceit. All this, in an accelerating necessity of acquisition, by taking from one bank as Peter to pay another as Paul, a pace in front of examiners, and a suspicion ahead of interested parties, to the ultimate benefit of defendants.

On appeal, defendants contend that the trial court committed error in many respects. Sachs and Curran urge that the indictment is fatally defective in its substantive counts as well as in its conspiracy count. They claim that the trial court gave a prejudicial credibility instruction and that they were prejudiced by the trial court's fail-

[1] The full indictment contained eighteen counts. A number of these were dismissed. In addition, the Government on appeal suggests that we not consider the sufficiency of the participation counts, and we have not done so. The remaining counts of the indictment, on which defendants were convicted and which we have considered, are set out in the appendix.

Kahn was indicted in seventeen counts, eleven of which were dismissed. He was found guilty on the remaining counts, counts I, III, IV, VII, XVI and XVII.

Sachs was charged in seventeen counts, seven of which were dismissed. He was found guilty on the remaining counts, counts I, III, IV, VII, VIII, IX, X, XI, XVI and XVII.

Curran was indicted in eight counts, four of which were dismissed. He was found guilty on the remaining counts, counts I, III, XVI and XVII.

ure to give a "La Buy" instruction concerning lying witnesses. They further contend that the trial court should have granted a mistrial when a co-defendant, Thomas Joyce, pleaded guilty in the early stages of the trial as an aider and abettor. Finally, they assert that prejudicial error was committed by the trial court's refusal to grant them a severance from Kahn.

In Kahn's appeal, in addition to the above contentions respecting the defectiveness of the indictment, the joinder of defendants and the mistrial upon Joyce's plea of guilty, which he also urges, Kahn claims that there was an improper joinder of counts, that the trial court erred in not giving a certain instruction as his theory of defense, and that irrelevant and immaterial evidence was wrongly admitted at trial.

Sufficiency of the Indictment

At the outset of our consideration, we note that we do not suffer the inability of the antique common law "to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." *Paraiso* v. *United States,* 207 U.S. 368, 372 (1907). Indictments are read for their clear meaning, and convictions are not reversed because of minor deficiencies which did not prejudice the accused. *Smith* v. *United States,* 360 U.S. 1, 9 (1959).

It is not necessary in a conspiracy indictment to allege with precision all the elements essential to the offense which is the object of a conspiracy; allegations clearly identifying the offense defendants conspired to commit are sufficient. *Wong Tai* v. *United States,* 273 U.S. 77, 81 (1927).

The test for the sufficiency of an indictment is "whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense,

whether the record shows with accuracy to what extent he may plead a formal acquittal or conviction.'" *Hagner* v. *United States,* 285 U.S. 427, 431 (1932); *United States* v. *Airdo,* 7 Cir., ... F. 2d ..... (June 19, 1967).

The last two conditions of the test are not equivalent to the first, for the first establishes what must be proved, that combination of elements without which there is no crime alleged. Whether the elements are sufficiently alleged does not depend upon nice attention to technicality or formulistic recitals. "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by their fair construction can be found within the terms of the indictment." *Hagner* v. *United States, supra* at 433. *Cf.* Rule 52(a), Federal Rules of Criminal Procedure, 18 U.S.C.A.

While *Hagner* may be distinguished by the fact that it was concerned with a post verdict attack upon an indictment, its reasoning is applicable to indictments attacked before verdict, as long as no prejudice to defendants is shown in the indictment.

It is, however, in an asserted incomplete allegation of elements that defendants attack the sufficiency of the indictment.

The defendants contend that the first count of the indictment, the conspiracy count, is fatally defective because it contains no allegation that any of the alleged conspirators was connected in any capacity with any of the institutions named in the count.

Count I, brought under § 371, 18 U.S.C.A., alleges a conspiracy to violate §§ 656, 657, 1001, 1005, and 1006, 18 U.S.C.A. Of these statutes, only § 371, which prohibits conspiracy to commit an offense or to defraud the United States, and § 1001, which relates to false and fraudulent statements, do not require that the alleged offender be "an officer, agent or employee of or connected in any capacity" with federally authorized or protected financial institutions. The substantive count of the indictment re-

lating to § 1001, count XVIII, was dismissed. Defendants assert, therefore, that the § 1001 reference in count I cannot cure the failure of the count to allege the requisite capacity called for in the remaining four substantive statutes.

Count I, however, does allege that defendants controlled the management and operation of certain named financial institutions. In addition, it alleges certain overt acts in furtherance of the conspiracy; and some of the charged overt acts note certain official connections with the financial institutions named in the indictment.

These read as follows:

"3. On or about November 1, 1962, at Chicago, Illinois, S. Lawrence Kahn *presided* at a meeting of the Executive Committee of the Chatham Bank of Chicago.

* * *

"10. On or about December 20, 1962 M. Prial Curran executed an escrow agreement as *escrow agent* for Chatham Bank of Chicago relating to the sale of permanent reserve shares of Equitable Savings and Loan Association.

* * *

"14. On or about February 19, 1963 at Chicago, Illinois Rudy Weinberg was elected Secretary-Treasurer and Arthur B. Sachs appointed *General Counsel* of Equitable Savings and Loan Association by the Board of Directors and Equitable Savings and Loan Association." [Emphasis added.]

Defendants, however, citing *Pettibone* v. *United States*, 148 U.S. 197 (1893); *Brenner* v. *United States*, 2 Cir., 287 F. 636 (1922); *United States* v. *Devine's Milk Laboratories, Inc.*, D. Mass., 179 F. Supp. 799 (1960), assert that allegations of overt acts cannot cure an inadequacy in a conspiracy indictment.

In *Pettibone, supra* at 203, the Supreme Court said:

> "• • • the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

The strictness of *Pettibone* was eroded, however, in *Hyde* v. *United States*, 225 U.S. 347 (1912) where the Court interpreted § 5440 of the Revised Statutes, the present § 371 conspiracy statute, which in its critical language reads exactly as § 5440 did.[2] It was stated that while at common law it was not necessary to aver or prove an overt act, § 5440 did require, as does § 371, some act to effect the conspiracy. Consequently, an overt act was required to be alleged along with conspiracy to constitute the offense under the federal statute.

Since an overt act is part of the offense, we see no reason why it may not be used to clarify the remainder of the count. This reading of the count as a whole is in accord with modern practice in reading indictments.[3] *Cf. Smith, supra; Hagner, supra; Rule* 52(a), *supra.*

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[2] The pertinent language of § 5440 reads:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States • • • and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable • • •."

Section 371 reads in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States • • • and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined • • •."

[3] *Hyde* was concerned with a construction of a conspiracy count for purposes of venue, and it may be supposed that it does not concern itself with the essential elements of the crime of conspiracy, but only with where a conspiracy may be deemed to have taken place, for purposes of venue. This belies the language of *Hyde*, which directly states that an overt act is a requisite element of conspiracy.

It is an anomaly that an indictment charging a conspiracy must charge an agreement to commit an offense, the object of the conspiracy, and an overt act, *United States* v. *Offutt, D.C. Cir.*, 127 F. 2d 336 (1942), but that allegations under the title of overt acts supposedly may not be resorted to in order to clarify the language charging conspiracy, *United States* v. *Knox Coal Company*, 3 Cir., 347 F. 2d 33 (1965), cert. den., 382 U.S. 904 (1965); *Reno* v. *United States*, 5 Cir., 317 F.2d 499 (499), cert. den., 357 U.S. 828 (1963). We have searched

Reading count I of the indictment as a whole, we hold that its allegations of control of management and operation, together with the factual allegations of overt acts, naming or at least intimating each of the defendants to have an official position with some of the financial institutions involved, satisfy the requirement that at least one of the conspirators be "connected in any capacity" with the institutions named in the count.

The defendants also challenge the sufficiency of the substantive counts of the indictment. Citing *United States* v. *Quinn*, 7 Cir., 365 F. 2d 256 (1966); *United States* v. *Britton*, 107 U.S. 655 (1882); and *United States* v. *Northway*, 120 U.S. 327 (1887), they urge that the misapplication counts of the indictment fail to allege the essential elements of conversion. Since the indictment was tested by motions for bills of particulars, which were denied, the alleged defect in the indictment has not been cured by failure to act on defendants' part.

In *Britton, supra* at 666-67, the Supreme Court stated:

> "We think the willful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some

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[3] (Continued)

for the reason for this anomaly, but have found none other than dead forms ruling from the grave.

The *Knox* and *Kemp* cases, which simply state a rule concerning allegations of overt acts, rely upon *Joplin Mercantile Co.* v. *United States*, 236 U.S. 531 (1915). The concern of *Joplin* is the agreement to conspire, and the Court there stated that overt acts cannot be used to show that the agreement was against federal law because "the averment of the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number * * *." *Joplin* at 535-36. In other words, an overt act alleging that one did an illegal thing does not allege that all conspired to do so, and therefore it cannot be relied upon as a charge.

The instant indictment is rather different, for the conspiracy count adequately charges conspiracy, and it is not necessary to refer to overt acts to find an illegal agreement.

Under the statutes under which defendants are charged, only one individual need have a connection with a federally insured institution. Allegations to that effect in the overt acts supply that identification without the danger, recognized in *Joplin*, that all defendants will be deemed to have conspired to do what was alleged in an overt act because one did so.

company or person other than the association. Therefore, to constitute the offence of willful misapplication, there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged. This essential element of the offence is not averred in the counts under consideration * * *."

In *Quinn, supra* at 260, this court, merely repeating the language of the Supreme Court in *Britton* at 669, interpreted *Britton* to hold only that the averment "wilfully misapplied" was not sufficient in an indictment, but that there must be further averments that the willful misapplication was made and that it was unlawful. In *Quinn*, the requirement of a further averment beyond that of willful misapplication was satisfied by the averment that the defendant converted the moneys in question to his own personal use.

Contrary to defendants' contention, *Quinn* does not require the incantation of an allegation of conversion in an indictment under § 657 or § 1006, 18 U.S.C.A. in order for the indictment to withstand a test of its sufficiency. As stated, the only requirement recognized by *Quinn* is an averment showing an unlawful application which, if proved, would amount to a conversion. Such an averment is necessary in order to avoid charging and convicting an individual for no more than maladministration, mistake, or ineptitude. *Cf. Britton, supra* at 667-668. Where it is clear that the allegedly defective count of the indictment cannot be read to charge mere maladministration, then the count is sufficient. *Cf. Britton, id.*

As applied to the instant case, therefore, the sufficiency of the counts of the indictment is to be tested, not by whether they literally allege conversion, but whether they allege unlawful application with the intent to defraud the association, to the use of some party other than the association.

Having carefully examined the counts of the indictment, we find that a number of them sufficiently charge an un-

lawful application to withstand the attack upon the sufficiency of the indictment. *Cf. Ramirez* v. *United States*, 9 Cir., 318 F. 2d 155 (1963).

Count III of the indictment charges Kahn, as vice-president and member of the Board of Directors of Chatham Bank of Chicago, and Sachs, as attorney of the Chatham Bank, with having fraudulently caused the disbursal of Chatham's check in the amount of $225,000, payable to Midwest Bank and Trust Company, which sum was represented to be the proceeds of a loan made to Sandy Building Corporation, secured by a mortgage on certain identified property, "well knowing that said property failed to provide sufficient security for the loan in that said property had fair market value substantially less than the disbursement * * *." The unlawful application of bank funds charged in this count is the knowing and purposive disbursal, without adequate security, of bank funds to a third party. The additional allegation in the count that such disbursal was made with the intent to defraud indicates that the disbursal, made knowing the inadequacy of the security, was not an act of maladministration, but one of criminal misapplication.

Count IV of the indictment similarly charges Kahn and Sachs with fraudulently causing the disbursal of a Chatham check in the amount of $155,000, payable to Edward Ferrari, purportedly representing proceeds of a Chatham loan in that amount which Kahn and Sachs fraudulently caused to be granted to Ferrari, "well knowing that the proceeds of said loan would be used for the personal benefit and advantage of said defendants and further well knowing that said loan was granted on the basis of a false and fraudulent letter of commitment" from a certain savings and loan association, and knowing the letter of commitment was executed without authority.

Defendants attack the sufficiency of this count, notwithstanding its charge of conversion, on the ground that it only speculates concerning a use in the future. This ground of attack is mistaken. Willful misapplication is the crime

charged. As we have said, a conversion need not be alleged as long as an unlawful application is shown by allegations. This was adequately done. Furthermore, the allegation of illegal disbursal to Ferrari, a third party, with knowledge that the proceeds of the loan would be used for their personal benefit in effect alleges a present conversion to a third party or to an agent of Kahn and Sachs.

The charges of count VII are adequate for the same reasons. Counts VIII and X, which were dismissed as to Kahn, also sufficiently charge a crime by Sachs.

Count XVI of the indictment charges Sachs and Curran with the misapplication of moneys belonging to and entrusted to the care and custody of Equitable Savings and Loan Association, of which Curran was a director and Sachs, attorney, in a fashion similar to the other counts. The count charges the illegal transfer of $625,070.27 to a certain named institution, which amount allegedly represented partial proceeds from a loan Sachs and Curran fraudulently caused to be made by Equitable, based upon inadequate security and a false appraisal report. Once again, the allegation of unlawful application is satisfied by showing transfer to a third party, without adequate security and through means of false information, of funds of a federally insured savings and loan association.

From the foregoing considerations, we conclude that those counts of the indictment about which there is a contest on appeal adequately charge crimes, and we hold that the indictment was sufficient.

Credibility Instruction

During the trial, the trial judge made an *in camera* inspection of FBI reports, which were based on FBI interviews with Sachs and Curran and which were not admitted into evidence at trial. Sachs and Curran contend that the trial judge's reading of the inadmissible material[4] and his resultant belief that there was a dis-

[4] The FBI reports were made inadmissible by stipulation. The trial court was forced to consider the reports carefully upon repeated Government motions that it be allowed to use them for impeachment purposes. All the Government's motions were denied.

crepancy between the defendants' testimony at trial and the information given in the FBI reports caused him to give a prejudicial credibility instruction.

At the conference on instructions, the Government tendered a "La Buy" credibility instruction, which defendants accepted without objection. This instruction reads:

> "In weighing the testimony of each witness the jury should consider his relationship to the Government, or to the defendant; the witness's interest, if any, in the outcome of the case; his manner of testifying; his candor, fairness and intelligence; and the extent to which he has been corroborated or contradicted, if at all, by other credible evidence.
>
> "A defendant who wishes to testify is a competent witness, and his testimony should not be disbelieved merely because he is the defendant. However, in weighing his testimony, the jury should consider the fact that a defendant has a vital interest in the outcome of this trial."

The trial judge in his charge to the jury, however, without notice to the Government or defendants, gave a much longer instruction relating to credibility.[5]

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[5] The instructions relating to credibility given by the trial court in large part closely parallel those given by Judge Medina in *United States* v. *Foster*, 9 F.R.D. 367, 388-389. While appeals were taken and the case was ultimately affirmed, *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201 (1950), 341 U.S. 494 (1950), the instructions themselves were not passed upon.

The instructions relating to credibility given by the trial court read as follows:

> "Now I come down to the general question, which is a problem in any criminal case of this type, and that deals with the question of the credibility of the witnesses who have testified because in the final analysis in this case, when you arrive at your verdict, it will be on the basis of the testimony that you heard here on the part of witnesses who took the witness stand, plus the documentary evidence that has been introduced.
>
> "Now, I don't think that I have to remind you that this particular case bristles with issues of veracity. I think that in instances too numerous to specify the testimony of the witnesses called by the Government has been flatly contradicted by the testimony of the defendants.
>
> "I call your attention only to one part of the testimony and I call your attention to that because it has been referred to in the closing arguments of counsel, and it is also more recent than some

Defendants urge that this longer instruction was given because the trial judge's reading of the FBI reports caused him to perceive discrepancies in testimony, to be suspicious of defendants' testimony, and therefore to overstress prejudicially the jury's duty to consider a witness's bias and interest in the outcome of the trial. It is contended, in effect, that by his insistent emphasis on credibility, the trial judge conveyed to the jury what almost amounted to a direction that the testimony of Sachs and Curran required more than ordinary scrutiny and that it could be rejected entirely.

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[5] (Continued)

of the other testimony that you may have heard, the testimony that you heard here.

"You will recall that there was some testimony furnished by the two defendants to the effect that before the $800,000 loan was disbursed, a loan committee meeting had been called in the office of Mr. Sachs and in which the two defendants testified that certain parties were present and they discussed the making of an $800,000 loan.

"Other witnesses in this case took the witness stand—and I am referring to Mr. Regas, the witness Regas; the witness Wolfson, and, I believe Mr. Lampros, but you will recall what the evidence was, in which they denied that any such meeting took place for the purpose of discussing the $800,000 loan in a loan committee meeting.

"Now, you as the jury—I am making no comment on this evidence, I am simply calling this evidence to your attention for the purpose of demonstrating what I mean when I am discussing the question of the credibility of witnesses.

"You will have to decide and you will have to make the choice as to which witnesses were speaking the truth. It is your function and your function alone to decide where the truth lies in this case.

"Now you may be asking yourself by what yardstick and in accordance with what rules of law you as the jury are to judge the credibility of the witnesses, including that of the two defendants who offered themselves as witnesses.

"Now, I suppose that every witness who takes the witness stand here and raises his hand is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witnesses testify, by the character of the testimony that he gives or by contradictory evidence.

"You should carefully scrutinize the testimony given, the circumstances under which each witness has testified in this case and every matter in evidence which tends to indicate whether the witness is worthy of belief.

"Now, you should consider each witness's intelligence, his motive, if you think there was some motive; his state of mind, his demeanor and manner while on the stand.

"You should also consider any relation each witness may bear to either side of the case. You should consider the manner in which

Length alone is not a controlling factor in assessing prejudice. *Cf. United States* v. *Birnbaum,* 2 Cir., 373 F. 2d 250, 257 (1967). Nonetheless, there are two questions which must be answered with respect to the credibility instruction given. The first determination to be made is whether it can be fairly said that the instruction singles out or unmistakably refers or draws attention to Sachs and Curran, or whether it was applicable to all witnesses who testified. It must then be determined whether the extended emphasis on credibility prejudiced them.

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[4] (Continued)

the witness may be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

"Now, inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony.

"Two or more persons witnessing an incident or a transaction may see it or hear it differently and innocent misrecollection, like failure of recollection, particularly as to times, dates, and places, is not an uncommon experience.

"In weighing the effect of a discrepancy I want you to consider whether it pertains to a matter of importance or to an unimportant detail and whether the discrepancy results from innocent error or willful falsehood.

"Now, if you find that the presumption of truthfulness is to be outweighed as to any witness, then you will give the testimony of that witness such credibility, if any, as you think that it deserves.

"Now, in other words, there is nothing different in the way that a jury is to determine the credibility of a witness from that in which all reasonable persons size up other people with whom they are dealing when they make important decisions.

"Now, as to that, you consider whether the person with whom you are dealing had the capacity and the opportunity to observe and be familiar and remember the things that he tells about. You consider any possible interest that he may have, any bias or prejudice. You decide whether the witness strikes you as being fair and candid; in other words, you size him up and then you consider the inherent believability of what he says and whether it accords with your own knowledge or experience. The same thing is true with witnesses; you ask yourself if they know what they are talking about. You watch them on the stand. You decide how their testimony strikes you.

"Take the matter of interest, for example. You may feel that some of the witnesses, whether for the Government or for the defense, have an interest in the outcome of this case. Where a witness has a strong personal interest in the outcome of a trial, the temptation may be strong to color, pervert or withhold the facts, or even though completely honest, a witness who has an interest in the case may unconsciously shade his testimony.

After examination of the challenged instruction, we cannot say that the jury was alerted that the credibility of Sachs and Curran, as distinguished from that of other witnesses, was to be given special examination. The instruction is directed to the credibility of all witnesses, is qualified to insure that it has application to all witnesses, and properly notes what can be taken into account in assessing credibility.

Other than what is claimed to be unwarranted emphasis, defendants do not argue that the instruction incorrectly states the law relating to credibility. It may indeed be that the FBI reports prompted the trial judge to give this instruction. However, to suggest that the origin of or motive for the unusually long instruction taints its substance is to assume that it is nothing more than its sources. Notwithstanding the possible origination of the instruction, we look to and judge only its legal substance.

While long, we find that the instruction was carefully balanced and that while it dealt at length with credibility, it in no way indicated who or what was credible or in-

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[5] (Continued)

"On the other hand, such a witness may be telling the exact truth despite his interest in the outcome. You must consider all of the attendant circumstances in determining whether and to what extent interest has affected a witness.

"What I have said concerning the interest of the witness applies with equal force to the matter of bias and prejudice; where you find that any witness has any bias or prejudice for or against any of the parties, you will consider whether and to what extent such bias or prejudice may have affected his testimony.

"You will, accordingly, observe that before reaching any conclusions as to whether or not you will believe the testimony of any particular witness or as to whether you will believe part of the testimony of a particular witness and reject the rest, it is essential that you give consideration to all of the circumstances bearing on the question of the credibility of a witness, as I have just indicated.

"If you believe that any witness in this case testified falsely as to a material fact, then you may disregard that testimony except insofar as it may be corroborated by other credible evidence in the case; in other words, what I want you to do is to take all of the evidence in the case, all of the testimony given from the witness stand, all of the exhibits that have been introduced and then go back to the jury room and say by your verdict whether these defendants are guilty of the charges made in this indictment or are innocent of the charges made in this indictment."

credible. What appears to emphasize when taken out of context is, in fact, unstressed in context. Reading the instruction on credibility with the other instructions, and taking the charge to the jury as a whole, we hold that there was no prejudicial emphasis upon defendants' credibility.

Instruction on Lying Witnesses

Sachs and Curran also contend that the trial court gave an erroneous instruction concerning lying witnesses. A standard instruction in this area is the "La Buy" *falsus in uno, falsus in omnibus* instruction which reads:

> "If the jury believes that a witness has wilfully sworn falsely to a material fact in the case, the jury may disregard his testimony in whole or in part, except insofar as it may have been corroborated by other credible evidence." La Buy Manual on Jury Instructions in Federal Criminal Cases, 33 F.R.D. 523, 574.

Relying on the fact that the Government had tendered this instruction, and believing that it would be given, counsel for Sachs and Curran, in closing argument, asked the jury to disbelieve totally the testimony of one witness, if they found that the witness testified falsely.

The trial court, however, gave an instruction, the second paragraph quoted below, to which the defendants object:

> "You will, accordingly, observe that before reaching any conclusions as to *whether or not you will believe the testimony of any particular witness or as to whether you will believe part of the testimony of a particular witness and reject the rest,* it is essential that you give consideration to all of the circumstances bearing on the question of the credibility of a witness, as I have just indicated.
>
> "If you believe that any witness in this case testified falsely as to a material fact, then you may

be corroborated by other credible evidence in the case; in other words, what I want you to do is to take all of the evidence in the case, all of the testimony given from the witness stand, all of the exhibits that have been introduced and then go back to the jury room and say by your verdict whether these defendants are guilty of the charges made in this indictment or are innocent of the charges made in this indictment." [Emphasis added.]

The words of the "La Buy" instruction defendants find critical in comparison with the given instruction, are "the jury may disregard his testimony in whole or in part * * *." In comparing this language with the contested instruction, defendants claim that the latter directs the jury to disbelieve only the specific testimony deemed false, and that it does not tell the jury it could disregard the whole of that witness's testimony as well.

That defendants' construction is strained is revealed by their argument that the given instruction tells the jury it may believe what it thinks false if the false testimony is corroborated. It is more natural, and therefore preferable, to read the given instruction to say that the testimony of a witness disbelieved with respect to a material fact may be disregarded in whole, except as corroborated.

With due respect to the ideal statement of the "La Buy" instruction, the instruction given, together with the paragraph preceding it, in the language we have shown emphasized, conveys the same meaning: *falsus in uno, falsus in omnibus.* We hold there was no error in the giving of this instruction.

Failure to Declare a Mistrial

Thomas Joyce was indicted and stood for trial along with Kahn, Sachs and Curran. On the second day of the trial, before witnesses were put on, he pleaded guilty, out of the presence of the jury, to aiding and abetting Sachs and Kahn in misapplying funds of the

Chatham Bank, the fourth count in the indictment in which they were named as principals. Following Joyce's plea, the defendants moved for a mistrial on the ground that Joyce's plea could not be explained to the jury without prejudicing the defendants. The further argument was made that one cannot be guilty of aiding and abetting unless a principal is found guilty of the same crime. Finally, it was argued that, with respect to the remaining counts of the indictment, some of which also included aiding and abetting charges against some of the defendants, it would be necessary for the court to tell the jury in its charge that the guilt of an aider-abettor is dependent upon that of the principal.

The trial judge denied the motions, and when the jury was returned, he instructed it that Joyce had pleaded guilty to count IV of the indictment, that Kahn and Sachs remained as defendants in count IV and that the trial would proceed against them. He then went on to instruct the jury at that time that Joyce's plea was not evidence of the guilt of the other defendants charged in the count and that the guilt or innocence of the other defendants was to be determined solely on the evidence introduced in the trial. The court gave a similar instruction in its charge to the jury at the conclusion of the trial.

On appeal, the same grounds are urged in favor of the proposition that a new trial should be granted. Additionally, it is asserted that the trial court abused its discretion in failing to declare a mistrial at such an early stage.

We cannot clearly know how certain disclosures or incidents at trial may affect the collective mind of the jury. The argument that a specific occurrence was prejudicial is always an argument that under the facts of the particular case the jury was probably so impressed with the occurrence that it could no longer perform its functions clear-mindedly and fairly. The rationale of cautionary or curative instructions, on the other hand,

is that the impression of the occurrence has not been so great that the jury cannot, as it were, bracket the occurrence, and disregard it.

The defendants have equated Joyce's guilty plea with a confession or statement admitted against a co-defendant, such as is found in *Barton* v. *United States*, 5 Cir., 263 F. 2d 894 (1959); *Schaffer* v. *United States*, 5 Cir., 221 F. 2d 17 (1955); and *United States* v. *Haupt*, 7 Cir., 136 F. 2d 661 (1943). Extensive descriptive statements were involved in the foregoing cases, and it was determined that statements of a defendant which were admitted into evidence and which were incriminating as to other defendants were so prejudicial as to have required separate trials.

While a plea of guilty is a confession of guilt, it lacks the impress, before substantial evidence has accumulated at trial, of a confession or statement in which the hard features of connected facts form a silhouette of verity. Notwithstanding the countervailing efficiency of granting a motion for a mistrial at an early stage of trial, a guilty plea entered then is not the equivalent of a descriptive confession of criminal deeds.

While we have distinguished between an extended confession of guilt and a plea of guilty, we must yet consider the effect of an aider-abettor's guilty plea upon his principal.

To say that an aider and abettor cannot be found guilty unless the principal is found guilty is different from saying that one so charged may plead guilty without a like plea by the principal. In the latter case, the guilty plea does not carry with it a finding that the principal is first guilty. It is not a necessary conclusion, therefore, that a jury instructed as to the dependency of its verdict as between principal and aider-abettor would adjudge a principal guilty on the plea of an aider, particularly where there has yet been no evidence, where there are curative or cautionary instructions, and where there are final, comprehensive instructions regarding proof, testimony, and weighing of the evidence.

A number of courts have determined a co-conspirator's or co-defendant's entry of a guilty plea, even on occasion before the jury, was not prejudicial, in view of a cautionary instruction. *E.g., Koolish* v. *United States,* 8 Cir., 340 F. 2d 513 (1965), cert. den., 381 U.S. 951 (1965); *Casados* v. *United States,* 5 Cir., 300 F. 2d 845 (1962), cert. den. 373 U.S. 938 (1963); *Davenport* v. *United States,* 9 Cir., 260 F. 2d 591 (1958), cert. den., 359 U.S. 909 (1959); *Nemec* v. *United States,* 9 Cir., 178 F. 2d 656 (1949), cert. den., 339 U.S. 985 (1950).

Whatever the rule should be regarding a confession of a co-conspirator, *cf.* Orfield, Criminal Procedure Under the Federal Rules, § 14.94, we are not persuaded that a jury cannot follow an admonition as to a plea of guilty where no evidence is elicited and where the meaning of the plea for other defendants is not emphasized. Absent aggravating circumstances, such as an incurable direct, stated, or necessary implication of the guilt of other defendants by the pleader, or the failure of the trial judge to give the jury cautionary instructions, we hold that the acceptance of a guilty plea by an aider-abettor without declaration of a mistrial is not error. Without a convincing demonstration otherwise, it is to be presumed that clear and strong cautionary instructions are curative.

Severance.

Defendants Sachs and Curran contend that the trial court committed prejudicial error in failing to grant them a severance from Kahn. Their contention is threefold. They claim that by being tried with Kahn, they were deprived of the right to comment in their argument to the jury upon Kahn's failure to take the stand. In the same manner, they contend they were precluded from exercising their Sixth Amendment right to call Kahn to the witness stand. Finally, they argue that the failure to sever resulted in the introduction of substantial complex testimony and documentary evidence that would have been inadmissible against them in a separate trial.

For his part, Kahn contends that there was an improper joinder of defendants, arguing in effect that because of the conspiracy count, he was subjected to the evils attendant upon conspiracy trials—the admission of evidence and proof of conspiracy by evidence admissible only upon the assumption that conspiracy existed. In other words, Kahn's argument appears to be the same as the final contention of Sachs and Curran that had there been separate trials, certain evidence that was admitted in the joint trial could not have been admitted against Kahn.

Severance of offenses and defendants is discretionary with the trial court. Rule 14, Federal Rules of Criminal Procedure, 18 U.S.C.A.; *Opper* v. *United States,* 348 U.S. 84, 95 (1954); *United States* v. *Echeles,* 7 Cir., 352 F. 2d 892 (1965), and cases cited there. Of course, such discretion is subject to correction if abused. *Echeles, supra.*

Generally, where the indictment charges a conspiracy, or a crime having a principal and aider-abettors, the rule is that persons jointly indicted should be tried together. *United States* v. *Lebron,* 2 Cir., 222 F. 2d 531, 535 (1955), cert. den., 350 U.S. 876 (1955). And where proof of the charges against the defendant is dependent upon the same evidence and alleged acts, as is the case when the charged relationship of the defendants is principal-aider-abettor, severance should not be granted except for the most cogent reasons. *United States* v. *Smith,* D.C. Ill., 209 F. Supp. 907, 914 (1962). *Cf. United States* v. *Kahaner,* D.C. N.Y., 203 F. Supp. 78 (1962); *United States* v. *Bentvena,* D.C., N.Y., 193 F. Supp. 485 (1960), aff'd, 2 Cir., 357 F. 2d 58 (1966), cert. den., 385 U.S. 815 (1966). Not to be forgotten among the considerations affecting the exercise of the trial court's discretion is the possible prejudice to the Government which might result from a separate trial. *Smith, supra.*

We are aware of and concerned with the problems in protecting the rights of individuals in conspiracy trials. Procedural and evidentiary advantages given the prosecution and the substantial difficulties raised for defendants

attempting to distinguish themselves and their acts as innocent in a confusing crowd of suspicious figures and activities were noted by Justice Jackson in his classic concurring opinion in *Krulewitch* v. *United States,* 336 U.S. 440, 445 (1949).

Acts and declarations of conspirators in furtherance of a conspiracy are admissible against alleged co-conspirators. Ordinarily, some evidence of a conspiracy should be furnished before the statements of alleged co-conspirators are admitted against each other. This practice, however, is relaxed by the discretion of the trial court. Statements and testimony as to acts are received in evidence, with an objection shown, and the jury is given the mass of evidence, undifferentiated except as the order of proof, objections of counsel, and instructions of the judge distinguish it. The jury is instructed, as it was a number of times in this case, both during the trial and at the charge, that if it finds beyond a reasonable doubt that a conspiracy existed, then the acts and statements of those whom it finds conspirators are admissible against the co-conspirators. But the jury is also instructed that in determining whether any particular defendant was a member of the conspiracy, it should consider only his own acts and statements, as a defendant cannot be bound by the acts or statements of members of the conspiracy until the jury finds that a conspiracy existed and that he was a member of it.

It can be readily seen, therefore, that a conspiracy trial creates real and serious possibilities of confusion in the jury, which may indulge in unwarranted imputations of guilt, particularly where the evidence is complex or circumstantial and where there are many defendants.

These are the risks of a conspiracy trial before a jury, risks tempered by the assumption of the jury system that jurors understand and follow instructions on the law. As always, however, the theoretical issue must be examined in the glare of fact. The question which must be asked in the particular case is whether the possibilities of dan-

ger to a fair trial have become realities of prejudice in the jury.

Thus, with respect to a severance in a trial of co-conspirators or co-defendants, it is necessary to determine whether a joint trial infringes a defendant's right to a fundamentally fair trial. *Echeles, supra.* This determination is made by asking whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant. *Gorin* v. *United States,* 1 Cir., 313 F. 2d 641, 646 (1963), cert. den., 374 U.S. 829 (1963); *Smith, supra; Kahaner, supra.*

In view of the complete admonitory instructions given by the trial court, to find an abuse of discretion in the trial court's failure to grant a severance of defendants in a trial on an indictment charging conspiracy and joining defendants in the relation of principal-aider-abettor, on grounds relating to the complexity and admissibility of evidence, the defendants must make a strong showing of prejudice. We have examined the cited record for the suggested confusing and prejudicial knot of evidence and have not found it. Not having found nor having been shown the clear likelihood of confusion in the jurors' minds so great as to prejudice the defendants, we hold the trial court did not abuse its discretion in refusing to grant a severance.

Sachs and Curran, relying on *De Luna* v. *United States,* 5 Cir., 308 F. 2d 140 (1962), reh. den., 324 F. 2d 375 (1963), claim prejudice from their joint trial with Kahn because of their inability to comment on Kahn's failure to take the stand.

De Luna was a narcotics case in which the two co-defendants had contradictory defenses. De Luna and Gomez were the occupants of a car from which police observed narcotics thrown. Gomez testified that he was innocent and that his only connection with the narcotics occurred when de Luna, seeing police coming, tossed him

a package, the contents of which were unknown to Gomez, and told him to throw it out the window, which he did. De Luna did not testify, and his attorney argued that Gomez was the sole culprit. Gomez was found not guilty; de Luna guilty. On the question of whether the Fifth Amendment protected de Luna from prejudicial comments on his silence, the court held that he had a constitutionally guaranteed right to silence and that his co-defendant's attorney could not comment on his silence.

In the course of its opinion, the court offered the following dicta, upon which defendants rely:

> "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.
>
> • • •
>
> "• • •. And considering the case from Gomez's point of view, his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Gomez has rights as well as de Luna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from de Luna's absence from the stand." *De Luna* at 141, 143.

Circuit Judge Bell, in his special concurrence in *De Luna,* expressed his disagreement with the majority with respect to the scope of the right of Gomez:

> "There is no authority whatever for the proposition that Gomez would in any wise have been deprived of a fair trial if the comments regarding the failure of de Luna to testify had not been made. He had no right to go that far. He did have the right to testify against de Luna as he did. • • •.

• • •

"• • •. If Gomez, or others similarly situated, claims the right which the majority holds that he has to comment on the failure of de Luna to testify, a mistrial will be required at the instance of his co-defendant who did not take the stand. In addition, severance in advance of trial may be required where there is a representation to the court that one co-defendant does not expect to take the stand while another or others do expect to testify, and claim their right to comment upon the failure of the other to testify. This would eliminate joint trials, or vest in a defendant the right to a mistrial during final arguments, or in the alternative create built-in reversible error, all in the discretion of the defendants." *De Luna* at 155-56.

The remarks of Judge Bell clearly reveal the difficulties involved in holding that defendants have a right to comment upon the silence of their co-defendants. The question as we see it is how essential is it to a fair and complete defense, an attribute of a fair trial, that defendants be permitted to comment upon a co-defendant's exercise of his right against self-incrimination.

The procedural difficulties and the complication of joint trials arising from the rule suggested by dicta in *De Luna* are so great that we cannot say there is an absolute right, without reference to the circumstances of defense at trial, for a defendant to comment on the refusal of a co-defendant to testify. We think there must be more to justify the disintegration of a trial, such as a conspiracy trial, in which there is a cohesion of crime alleged, defendants charged, and proof adduced. There must be a showing that real prejudice will result from the defendant's inability to comment. *Hayes* v. *United States*, 8 Cir., 329 F. 2d 209, 221 (1964); cert. den., 377 U.S. 980 (1964).

There was an effort in the defense to get the jury to divorce its consideration of the guilt of Sachs and Curran from that of Kahn on the various charges, and correlative

to this, there was an attempt to portray Sachs and Curran as innocent and rather naive agents of a dexterous mastermind, Kahn, and his principal accomplices. An element of Kahn's defense, somewhat inconsistent with that of Sachs and Curran, was that Kahn, in his activities, acted, apparently in good faith, with the advice and in conjunction with responsible and reputable individuals.

Thus, it must be concluded from the record that the defense of Sachs and Curran was inconsistent with that of Kahn. The degree of antagonism, however, is not as great as that in *De Luna* where the defenses were mutually exclusive. There, if one defense were believed, the other could not be. In the instant case, it is not clear that Kahn could not have been found innocent if Sachs and Curran were so found.

It must be noted that there were many witnesses and that a great amount of evidence was brought before the jury. However, the extensive evidence and testimony did not present the jury the dilemma of mutually exclusive defenses, with no evidentiary basis for judgment between them, in which a comment on the failure to testify would indicate which horn of the dilemma should be seized. While we dislike the necessity of weighing the benefit which might accrue to a defendant by his counsel's comment on a co-defendant's refusal to testify, we are not convinced that Sachs and Curran suffered any prejudice from their inability to do so. We hold that the trial court did not err in refusing to sever for the ground asserted.

Finally, with respect to severance, Sachs and Curran, relying on *United States* v. *Echeles, supra,* claim that the joint trial with Kahn prejudiced them by precluding them from exercising their right to call Kahn to the witness stand.

In *Echeles,* attorney Echeles was tried jointly with his former client, Arrington, for subornation of perjury. Echeles moved for severance, which was denied, on the ground, *inter alia,* that he would be unable to call Arrington to the stand for the purpose of eliciting testimony

exculpatory of Echeles. On appeal, this court, aware of the fact that there was record testimony of Arrington from prior proceedings which was exculpatory of Echeles stated:

> "• • • we hold merely that, having knowledge of Arrington's record testimony protesting Echeles' innocence, and considering the obvious importance of such testimony to Echeles, it was error to deny the motion for a separate trial." *Echeles* at 898.

As with the right to comment on the silence of a co-defendant, there is no absolute requirement for a severance when defendants suggest that the testimony of a co-defendant is not available to them unless they are tried separately. The unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous. *United States* v. *Kahn*, 2 Cir., 366 F. 2d 259, 263-64 (1966), cert. den., 385 U.S. 948 (1966); *Olmstead* v. *United States*, 9 Cir., 19 F. 2d 842, 847-48 (1927), aff'd, 277 U.S. 438 (1928).

Kahn's Further Contentions.

In addition to those of the above contentions which he joins, Kahn urges that there was an improper joinder of defendants, that the court erred in not giving a certain instruction relating to Kahn's theory of defense, and that irrelevant and immaterial evidence was admitted.

Kahn contends that there was an improper joinder of the conspiracy count and the substantive counts of the indictment, claiming that the joinder reflects a prosecutorial attempt to overwhelm the defendants with prejudicial evidence in a situation in which the trial court cannot adequately protect them.

The question of a severance of counts, as Kahn recognizes, is addressed to the discretion of the trial court, the exercise of which is corrigible only for abuse. To find an abuse of discretion it would be necessary, in effect, to find that the facts and law presented to the trial judge

at the time of the motion for severance demonstrated that a trial under joinder was likely to be unfair and that the trial was in fact unfair. Of course, the latter finding would go far in supporting the former.

The conspiracy count in the indictment in the present case essentially charges a conspiracy to commit the crimes charged in the substantive counts. Thus, there is no disparity of charges tending to complicate or confuse the proof or defendants. In a trial under this kind of indictment, the possible threats to a fair trial arose from the joinder of defendants, and not of counts. The joinder of defendants, as we have held, was not improper.

With respect to the trial court's refusal to instruct the jury to acquit Kahn if it believed he was acting according to the advice of his counsel, the law requires, before an instruction relating to a theory of defense is given, that the record contain evidentiary support for the theory. *Perkins* v. *United States,* 9 Cir., 315 F. 2d 120, 124 (1963), cert. den., 375 U.S. 916 (1963). That evidentiary support is lacking in this case. Furthermore, there must be a showing that the defendant made full disclosure to his attorneys of all the facts pertaining to the transactions under scrutiny. *United States* v. *Hickey,* 7 Cir., 360 F. 2d 127, 142 (1966), cert. den., 385 U.S. 928 (1966). There is no contention on appeal that Kahn could not put on such proof because his attorneys were his co-defendants.

Kahn's final contention is that the trial court admitted immaterial and irrelevant evidence relating to transactions falling outside the indictment. The Government rejoins, however, that the evidence was both material and relevant.

We have examined the cited evidence, which relates to the repayment by certain companies controlled by Kahn of loans made them by a bank with which Kahn and Sachs were involved. Since the evidence relates to the disposition of loan funds, which defendants were charged with misapplying, we do not find it irrelevant to the inquiry into misapplication. Furthermore, we agree with the Gov-

ernment that these loans are imprinted with the pattern of loan manipulation with which Kahn was charged, and that evidence relating to them was relevant to intent with respect to the counts charged. See *United States* v. *Klein*, 2 Cir., 340 F. 2d 547 (1965), cert. den., 382 U.S. 850 (1965).

Generally, the admission of evidence for such a purpose would require an instruction limiting the jury to consideration of it only with respect to intent. However, the evidence was not admitted with so limited a purpose, and no request was made that it be limited. Consequently, it must be deemed generally admitted, and as it was relevant and material, that its admission was not prejudicial.

In sum, we conclude that defendants were accorded a fair trial, and, there being no challenge to the sufficiency of the evidence to convict, the judgments appealed from are affirmed.

AFFIRMED.

APPENDIX.

COUNT I

1. That commencing on or about July 1, 1962 and continuing to on or about the date of this indictment, in the Northern District of Illinois and other places to the Grand Jurors unknown,

S. Lawrence Kahn,
Arthur B. Sachs,
Thomas E. Joyce, and
M. Prial Curran,

defendants herein, knowingly and wilfully did conspire, combine and confederate with each other and with Edward Ferrari and Mary Jean Burleson, named as co-conspirators herein, but not as defendants, and with other persons whose names to this Grand Jury are unknown, to commit offenses and to aid, abet, counsel and procure the commission of offenses against the United States, to-wit: to unlawfully and wilfully violate Sections 656, 657, 1001, 1005 and 1006, Title 18, United States Code, more particularly:

(a) to misapply and cause to be misapplied for their own personal gain, use, benefit and advantage moneys and funds of the Chatham Bank of Chicago, the deposits of which were insured by the Federal Deposit Insurance Corporation with intent to defraud said Chatham Bank of Chicago;

(b) to misapply and cause to be misapplied for their own personal gain, use, benefit and advantage moneys and funds belonging to and entrusted to the care and custody of Leyden Savings and Loan Association, Franklin Park, Illinois; Equitable Savings and Loan Association, Chicago, Illinois; Property Federal Savings and Loan Association, Chicago, Illinois; and George Washington Savings and Loan Association, Chicago, Illinois, the accounts of which

were insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud said Savings and Loan Associations;

(c) to participate, share in and directly and indirectly receive moneys and funds of Leyden Savings and Loan Association, Equitable Savings and Loan Association, Property Federal Savings and Loan Association, and George Washington Savings and Loan Association, through loans and transactions of said Associations, the accounts of which were insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud said Associations;

(d) to make and cause to be made false entries in the books, reports, records and statements of Chatham Bank of Chicago, with intent to defraud said Chatham Bank of Chicago and the agents and examiners appointed to examine the affairs of said bank.

(e) to make and cause to be made false entries in the books, reports, records and statements of Leyden Savings and Loan Association, Equitable Savings and Loan Association, Property Federal Savings and Loan Association and George Washington Savings and Loan Association, with intent to defraud said Associations and the auditors, agents and examiners of the Federal Home Loan Bank Board.

2. It was a part of said conspiracy for the defendants through their control of the management and operation of the Chatham Bank of Chicago to fraudulently cause loans to be made by said Chatham Bank of Chicago in excessive amounts to various individuals and corporations controlled by said defendants or their nominees for defendants' own personal use, benefit and advantage.

3. It was a further part of said conspiracy for the defendants through their control of the management and operation of Property Federal Savings and Loan Association to fradulently cause loans to be made in excessive amounts to various individuals and corporations controlled

by said defendants or their nominees for the defendants' own personal use, benefit and advantage.

4. It was a further part of said conspiracy for the defendants to acquire control of the management and operation of Leyden Savings and Loan Association with funds partially supplied through loans defendants fraudulently caused to be made by Chatham Bank of Chicago.

5. It was a further part of said conspiracy for the defendants to secure control of the management and operation of Leyden Savings and Loan Association partially with funds derived from a loan commitment letter defendants fraudulently caused to be issued on behalf of Property Federal Savings and Loan Association.

6. It was a further part of said conspiracy for the defendants upon acquiring control of the management and operation of Leyden Savings and Loan Association to cause loans in excessive amounts to be fraudulently granted by Leyden Savings and Loan Association to various corporations controlled by the defendants or their nominees for the defendants' own personal benefit, use and advantage.

7. It was a further part of said conspiracy for the defendants to use moneys and funds obtained through loan proceeds defendants caused to be fraudulently disbursed by Leyden Savings and Loan Association to purchase control of Equitable Savings and Loan Association and George Washington Savings and Loan Association.

8. It was a further part of said conspiracy for the defendants upon acquiring control of Equitable Savings and Loan Association to cause excessive loans to be granted to various corporations controlled by the defendants or their nominees for the defendants' own personal benefit, use and advantage.

9. It was a further part of said conspiracy for the defendants to cause fraudulent loans to be made by Property Federal Savings and Loan Association and Equitable Savings and Loan Association for the purpose of securing

funds necessary to repay various outstanding loans defendants had fraudulently caused to be granted for their own personal use, benefit and advantage at Chatham Bank of Chicago and Leyden Savings and Loan Association.

10. It was a further part of said conspiracy for the defendants to conceal their control of the management and operation of Leyden Savings and Loan Association, Equitable Savings and Loan Association and George Washington Savings and Loan Association through the use of nominees whom defendants caused to be appointed officers and directors of said Associations.

11. It was a further part of said conspiracy for the defendants to fraudulently cause inflated real estate appraisal reports to be submitted to Chatham Bank of Chicago, Leyden Savings and Loan Association, Property Federal Savings and Loan Association and Equitable Savings and Loan Association to support mortgage loans defendants caused to be granted by these institutions for the defendants' own personal use, benefit and advantage, well knowing that said appraisals were not based on fair market values but were in truth and in fact based upon speculation and conjecture as to the future potential of the properties involved.

12. It was a further part of said conspiracy for the defendant through false statements and representations to Federal Home Loan Board examiners and Illinois State examiners investigating the affairs of Chatham Bank of Chicago, Equitable Savings and Loan Association and Leyden Savings and Loan Association and Property Federal Savings and Loan Association to attempt to conceal information with respect to various loans defendants had fraudulently caused to be made by these institutions as well as the disbursement and disposition of proceeds thereof.

13. Defendants and co-conspirators at several times and places hereinafter mentioned performed and caused to be performed overt acts in pursuance of, in execution of and to effect, employ and accomplish the objects, de-

signs and purposes of said conspiracy, including, but not limited to, the following:

OVERT ACTS

1. On or about October 1, 1962 Edward Ferrari caused an application for a loan to be made in the name of Raymond Kuznair, in the amount of $75,000.00 at Property Federal Savings and Loan Association, Chicago, Illinois.

2. On or about October 30, 1962 defendant Arthur B. Sachs caused Articles of Incorporation of Sandy Building Corporation to be filed at the office of the Secretary of State, Springfield, Illinois;

3. On or about November 1, 1962 at Chicago, Illinois, S. Lawrence Kahn presided at a meeting of the Executive Committee of the Chatham Bank of Chicago.

4. On or about November 1, 1962 at Chicago, Illinois, S. Lawrence Kahn and Arthur B. Sachs executed an escrow agreement with the Scott-Grand Building Corporation.

5. On or about November 2, 1962 Thomas E. Joyce executed a letter of commitment as attorney for Property Federal Savings and Loan Association addressed to Chatham Bank of Chicago.

6. On or about November 2, 1962 Arthur B. Sachs caused Chatham Bank of Chicago Cashier's Check No. 301214 in the amount of $155,000.00, payable to Edward Ferrari, to be deposited in the account of Arthur B. Sachs at the American National Bank and Trust Company of Chicago.

7. On or about November 8, 1962 M. Prial Curran, Henrietta Keating, Jerome Kritchevsky and Victor Born were appointed to the Board of Directors of Leyden Savings and Loan Association at a meeting of the Board of Directors of said Association held at Franklin Park, Illinois.

8. On or about November 15, 1962 Thomas E. Joyce had a conversation on the telephone with Victor Born.

9. On or about November 28, 1962 Arthur B. Sachs issued a check drawn on his account at the American National Bank of Chicago in the amount of $175,000.00, payable to Alan James Development Company;

10. On or about December 20, 1962 M. Prial Curran executed an escrow agreement as escrow agent for Chatham Bank of Chicago relating to the sale of permanent reserve shares of Equitable Savings and Loan Association.

11. On or about January 23, 1963 at Chicago, Illinois Edward Ferrari on behalf of ASKO Investments, Inc. executed a contract for the purchase of permanent reserve shares of George Washington Savings and Loan Association.

12. On or about January 23, 1963 Leyden Savings and Loan Association, Franklin Park, Illinois, defendant S. Lawrence Kahn caused the issuance of two Leyden Savings and Loan Association's checks, to-wit: Check No. 10755, in the amount of $616,900.00, payable to Premier In tment Service, Inc., and Check No. 10754, in the amount of $375,000.00, payable to Three States Mortgage Company.

13. On or about January 25, 1963 defendants caused a loan in the amount of $400,000.00 to be made by American National Bank and Trust Company, Chicago, Illinois, to Viking Investment Corp.

14. On or about February 19, 1963 at Chicago, Illinois Rudy Weinberg was elected Secretary-Treasurer and Arthur B. Sachs appointed General Counsel of Equitable Savings and Loan Association by the Board of Directors of Equitable Savings and Loan Association.

15. On or about March 28, 1963 Rudy Weinberg had a conversation with M. Prial Curran at Chicago, Illinois.

16. On or about April 8, 1963 Arthur B. Sachs deposited Check No. 77502 of Equitable Savings and Loan Association in the amount of $41,341.88 to his account at the American National Bank of Chicago.

17. On or about June 20, 1963 defendants S. Lawrence Kahn and Arthur B. Sachs caused to be submitted to Equitable Savings and Loan Association an appraisal report of Angelo LoMonaco and Associates.

18. On or about August 2, 1963 Arthur B. Sachs wrote a letter to Federal Home Loan Bank Board, 104 South Michigan Avenue, Chicago, Illinois.

in violation of Section 371, Title 18, United States Code.

COUNT III.

The January 1964 Grand Jury further charges:

That on or about November 2, 1962, in the Northern District of Illinois, Eastern Division,

S. LAWRENCE KAHN,

Vice President and member of the Board of Directors of Chatham Bank of Chicago, and

ARTHUR B. SACHS,

duly appointed attorney of the said Chatham Bank of Chicago, the deposits of which were then insured by the

Federal Deposit Insurance Corporation, with intent to defraud the said Chatham Bank of Chicago, did unlawfully and wilfully misapply and cause to be misapplied moneys, funds and credits of said Chatham Bank of Chicago in the amount of $225,000.00 by fraudulently causing to be disbursed Chatham Bank of Chicago Cashier's Check No. 301222, dated November 2, 1962, in the amount of $225,000.00, payable to Midwest Bank and Trust Company, which sum purportedly represented proceeds of a loan made to Sandy Building Corporation secured by a mortgage on the property located at 10001 West Grand Avenue, Franklin Park, Illinois, well knowing that said property failed to provide sufficient security for the loan in that said property had a fair market value substantially less than the disbursement of $225,000.00 as aforesaid; in violation of Section 656, Title 18, United States Code; and

M. PRIAL CURRAN,

did wilfully and knowingly and with intent to defraud the Chatham Bank of Chicago as above described, aid, abet, counsel, induce and procure the commission of the above and foregoing offense against the United States of America; in violation of Sections 2 and 656, Title 18, United States Code.

COUNT IV.

The January 1964 Grand Jury further charges:

That on or about November 2, 1962, in the Northern District of Illinois, Eastern Division,

S. LAWRENCE KAHN.

defendant herein, Vice President and member of the Board of Directors of Chatham Bank of Chicago, and

ARTHUR B. SACHS,

defendant herein, duly appointed counsel of the said Chatham Bank of Chicago, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to defraud said Chatham Bank of Chicago, did unlawfully and wilfully misapply and cause to be misapplied

moneys, funds and credits of said Chatham Bank of Chicago in the amount of $155,000.00 by fraudulently causing to be disbursed Chatham Bank of Chicago Cashier's Check No. 301214, dated November 2, 1962, in the amount of $155,000.00, payable to Edward Ferrari, purportedly representing proceeds of a Chatham Bank of Chicago loan in the amount of $155,000.00 which defendants S. Lawrence Kahn and Arthur B. Sachs, fraudulently caused to be granted to Edward Ferrari, well knowing that the proceeds of said loan would be used for the personal benefit and advantage of said defendants and further well knowing that said loan was granted on the basis of a false and fraudulent letter of commitment executed by Thomas E. Joyce purportedly on behalf of Property Federal Savings and Loan Association, dated October 31, 1962, which letter purportedly committed said Association to pay $155,000.00 to Edward Ferrari and Chatham Bank of Chicago from proceeds of four loans described therein, whereas in truth and in fact said defendants well knew Thomas E. Joyce executed said letter of commitment without authority and without said commitment having been approved by the Board of Directors, of said Property Federal Savings and Loan Association and further, without all four loans referred to in said letter of commitment having been approved by said Property Federal Savings and Loan Association at the time of the issuance of said commitment as aforesaid; in violation of Section 656, Title 18, United States Code; and

THOMAS E. JOYCE,

did, wilfully and knowingly and with intent to defraud the Chatham Bank of Chicago as above described, aid, abet, counsel, induce and procure the commission of the above and foregoing offense against the United States of America; in violation of Sections 2 and 656, Title 18, United States Code.

COUNT VII.

The January 1964 Grand Jury further charges:

That on or about January 17, 1963, in the Northern District of Illinois, Eastern Division.

S. LAWRENCE KAHN,

defendant herein, Vice President and member of the Board of Directors of the Chatham Bank of Chicago, and

ARTHUR B. SACHS,

defendant herein, duly appointed counsel of said Chatham Bank of Chicago, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to defraud said Chatham Bank of Chicago, did unlawfully and wilfully misapply and cause to be misapplied moneys, funds and credits of said Chatham Bank of Chicago in the amount of $123,125.00 by fraudulently causing to be deposited in the account of Premier Investment Service, Inc. $123,125.00 representing proceeds of Chatham Bank of Chicago Loan No. 29400, which loan defendants caused to be granted by said bank on the basis of a letter of commitment dated January 15, 1963 from Leyden Savings and Loan Association to Premier Investment Service, Inc. committing said Leyden Savings and Loan Association to make a loan in the amount of $616,900.00 to Premier Investment Service, Inc., which commitment the defendants well knew to be false and fraudulent in that Premier Investment Service, Inc. possessed no legal interest in the property purportedly to be used as security for making said loan and further well knowing that said letter of commitment had been obtained without the approval or knowledge of the Board of Directors of said Leyden Savings and Loan Association; in violation of Section 656, Title 18, United States Code.

COUNT VIII. (Dismissed as to Kahn.)

The January 1964 Grand Jury further charges:

That on or about January 23, 1963, in the Northern District of Illinois, Eastern Division,

S. LAWRENCE KAHN,

connected with Leyden Savings and Loan Association, Franklin Park, Illinois, by means of and through his nominee, Victor Born, Executive Vice President of said As-

sociation, and through whom said defendant S. Lawrence Kahn exercised control over the operations of said Association, and

ARTHUR B. SACHS,

attorney for said Association, a Savings and Loan Association, the accounts for which were then insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud said Leyden Savings and Loan Association, did unlawfully and wilfully misapply and cause to be misapplied moneys, funds and credits belonging to and entrusted to the care and custody of said Leyden Savings and Loan Association in the amount of $616,900.000, by fraudulently causing to be disbursed Leyden Savings and Loan Association Check No. 10755, dated January 24, 1963, payable to the order of Premier Investment Service, Inc., which sum of $616,900.00 purportedly represented proceeds of a loan defendants fraudulently caused to be made without the knowledge and approval of the Board of Directors of said Leyden Savings and Loan Association well knowing that said Association received no legally enforceable interest in any property as security for making said disbursement; in violation of Section 657, Title 18, United States Code.

COUNT X. (Dismissed as to Kahn.)

The January 1964 Grand Jury further charges:

That on or about January 23, 1963, in the Northern District of Illinois, Eastern Division,

S. LAWRENCE KAHN,

connected with Leyden Savings and Loan Association, Franklin Park, Illinois, by means of and through his nominee, Victor Born, Executive Vice President of said Association, and through whom said defendant S. Lawrence Kahn exercised control over the operations of said Association, and

ARTHUR B. SACHS,

attorney for said Association, a Savings and Loan Association, the accounts of which were then insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud said Leyden Savings and Loan Association, did unlawfully and wilfully misapply and cause to be misapplied moneys, funds and credits belonging to and entrusted to the care and custody of said Leyden Savings and Loan Association in the amount of $375,000.00, by fraudulently causing to be disbursed Leyden Savings and Loan Association Check No. 10754, dated January 24, 1963, in the amount of $375,000.00, payable to Three States Mortgage Company, which sum of $375,000.00 purportedly represented proceeds of a loan defendants fraudulently caused to be made without the knowledge and approval of the Board of Directors of said Leyden Savings and Loan Association, well knowing that said Association received no legally enforceable interest in any property as security for making said disbursement; in violation of Section 657, Title 18, United States Code.

COUNT XVI.

The January 1964 Grand Jury further charges:

That on or about April 9, 1963, in the Northern District of Illinois, Eastern Division,

ARTHUR B. SACHS,

defendant herein, attorney for Equitable Savings and Loan Association, and

M. PRIAL CURRAN,

defendant herein, a member of the Board of Directors of said Equitable Savings and Loan Association, the accounts of which were then insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud the said Equitable Savings and Loan Association, did misapply and cause to be misapplied moneys, funds and credits belonging to and entrusted to the care and custody of said

Equitable Savings and Loan Association, in the amount of $625,070.27, on deposit at the South Shore National Bank transmitted via a wire transfer to the account of Three States Mortgage Company at the First Merchants National Bank, Michigan City, Indiana, which funds purportedly represented partial proceeds from Loan No. 12336 defendants fraudulently caused to be made by Equitable Savings and Loan Association in the amount of $800,000.00 without the knowledge and approval of the Board of Directors of said Equitable Savings and Loan Association, and well knowing that the property purportedly mortgaged to Equitable Savings and Loan Association as security for said loan had a fair market value substantially less than the amount of the loan, and that the appraisal report defendants caused to be submitted to Equitable Savings and Loan Association to support the disbursements as above described was false and fraudulent in that it was on a hypothetical plan regarding the future potential development of the mortgaged property and not on the property's then present character, to-wit: unimproved farm acreage; in violation of Section 657, Title 18, United States Code; and

S. LAWRENCE KAHN,

defendant herein, did, wilfully and knowingly and with intent to defraud the Equitable Savings and Loan Association as above described, aid, abet, counsel, induce and procure the commission of the above and foregoing offense against the United States of America; in violation of Sections 2 and 657, Title 18, United States Code.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Tuesday, September 12, 1967

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee* vs. S. LAWRENCE KAHN, *Defendant-Appellant*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 15665	

IT IS ORDERED by the Court that the petition for a rehearing en banc of this cause be, and the same is hereby DENIED.

(Kiley, Circuit Judge, did not participate in this matter.)

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281-907—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 715

S. LAWRENCE KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 718

ARTHUR B. SACHS AND M. PRIAL CURRAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (K. Pet. App. 1a–28a)[1] is reported at 381 F. 2d 824.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1967. A petition for rehearing was denied

[1] "K. Pet." refers to the petition filed by Kahn in No. 715.

on September 12, 1967 (K. Pet. App. 42a). The petition for a writ of certiorari in No. 715 was filed on October 11, 1967, and that in No. 718 on October 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to sever the co-defendants.

2. Whether the trial court's instructions on credibility were erroneous or unfair.

3. Whether the trial court properly refused petitioner Kahn's request for an instruction on the defense of good-faith reliance on legal advice, on the ground that there was no evidence to support such a defense.

4. Whether the indictment failed to allege essential elements of the offenses.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on various counts of an eighteen count indictment charging conspiracy and the illegal use of funds of a number of federally insured banks and savings associations, in violation of 18 U.S.C. 371, 656, 657, 1005, and 1006. On March 11, 1966, petitioner Sachs, who was convicted on ten counts, was sentenced to concurrent terms of imprisonment for five years on each count. Petitioner Curran was sentenced to concurrent two-year terms on four counts, and petitioner Kahn to concurrent terms of five years each on six

counts (S. App. 412–415).[2] The court of appeals affirmed.

The government's evidence was developed through numerous documents and the testimony of officers and employees of the financial institutions, and showed a chain of misuse of funds of one banking institution to acquire another. We do not canvass the evidence in detail since its sufficiency is not disputed. The pattern of petitioners' operations is exemplified, however, by the evidence relating to Counts III and IV, which shows how control of Leyden Savings and Loan Association was acquired.[3] Although Leyden was a mutual association, not subject to sale, there was an understanding that control of the association would shift with the sale of its building, worth $120,000, for $450,000 (Tr. 481–487). The purchase was financed by two loans from the Chatham Bank of Chicago, which Kahn controlled (Tr. 3080).

The first of these two loans, in the amount of $225,000, representing the bank's maximum limit, went to the Sandy Building Corporation, a company incorporated by Sachs and Curran. The loan was secured by a mortgage on property represented by Kahn to be worth over $400,000, but which an appraisal showed to be worth $257,000 (Tr. 1833–1835; 878–882). All of the details of this loan were handled by Sachs and Curran as the attorneys for all parties—Chatham,

[2] "S. App." refers to the appendix of the petitioners Sachs and Curran in the court below; "Tr." to the original transcript of trial proceedings.

[3] All of the petitioners were convicted on Count III, and Kahn and Sachs on Count IV. In addition, this acquisition was a major part of the conspiracy charge.

Kahn, and Sandy Building Corporation. The loan was not presented to the board of directors of Chatham, a fact of which Sachs was aware (Tr. 89–121, 278–285, 3069).

On the same day, Chatham granted the second loan. This loan, for $155,000, was made to one Ferrari (deceased at the time of trial), on the basis of a false letter of commitment on behalf of another association. The check was delivered to the office of Sachs, endorsed over to Sachs, and deposited in his bank account. Sachs then bought a cashier's check for $155,000. This check and the proceeds of the Sandy loan were used to purchase Leyden (Tr. 89–122, 245–278, 3077).

Curran, an associate in Sachs' law office, and employees and friends of Sachs and Kahn were elected directors of Leyden, and Sachs became its attorney (see Tr. 3079, 875–877). Improper disbursements of its funds to acquire other associations and to cover past manipulations as charged in other counts, then followed.

ARGUMENT

1. *Severance.* The petitioners in No. 718, Sachs and Curran, elected to testify at their trial, and they now argue that requiring them to be tried jointly with Kahn, who did not testify, deprived them of a Sixth Amendment right to call Kahn to the witness stand, and, in the event he refused to testify, to ask the jury to glean from such refusal an inference favorable to them.

This case, however, does not fairly present the issue raised by these two petitioners as to whether a

severance must be granted when a co-defendant "urgently needs to call to the witness stand a co-defendant" (S. Pet. 2).[4] Their involvement was not a matter peculiarly within Kahn's knowledge. Testimony as to incidents from which a knowing breach of trust could be inferred was presented by ten or more officers or employees of the institutions involved,[5] some of whom had close personal contacts with Sachs and Curran. Particularly damaging (as counsel for Sachs and Curran recognized (S. App. 333)) was the testimony of Mary Burleson, Kahn's secretary, who prepared documents and checks at Kahn's direction and who worked closely with the other petitioners (S. App. 98–222). Damaging evidence also came from such sources as an appraiser, who followed Kahn's and Sachs' instructions in inflating values (Tr. 1870–1878), and a state examiner who told of incriminating statements by Sachs (Tr. 449–458). Indeed, late in the trial, counsel for Sachs and Curran advised the court:

> Your Honor, in connection with this question of the severance, in a memorandum which we filed in which we discussed the Echles [sic] case, I indicated the possibility that we might call Mr. Kahn; I said that we would take it up in advance.

---

[4] "S. Pet." refers to the petition in No. 718, filed by Sachs and Curran.

[5] There was, for example, the testimony of Mr. Jernberg, a former president of Chatham Bank (Tr. 82–145); Mr. Musich, an executive vice president of the same bank (Tr. 244 *et seq.*); Mr. Conti, the former president of Leyden Savings and Loan Association (Tr. 479 *et seq.*), etc.

> I want to say that we have decided that that will not be done so that particular question will not arise [S. App. 328].[a]

This case is not comparable to *Washington* v. *Texas*, 388 U.S. 14, on which petitioners rely. In that case there was no question of severance. This Court held that a state statute which prevented a participant in a crime from testifying for a co-participant (but not for the prosecution) unconstitutionally denied to a defendant charged with murder the right to compulsory process. There the co-participant, who had been convicted of the murder, was willing to testify (and was the only person who could have so testified) that he—not the defendant—had fired the fatal shot and that the defendant had sought to prevent him from doing so. Thus, the defendant there was denied the only source of vital and exonerating testimony—testimony which was admittedly available.

By contrast, there is not the slightest support for Sachs' and Curran's speculation (S. Pet. 9, n. 4) that Kahn might have been willing to testify in their favor if a severance had been granted. In light of the breadth of the privilege of even a mere witness to fend off inquiries that might possibly connect him with a crime, there is little likelihood that Kahn could have been compelled to testify about any of the transactions in which he, Sachs, and Curran engaged.

[a] The case referred to is that of *United States* v. *Echeles*, 352 F. 2d 892, where the Seventh Circuit, in an explicitly limited decision, held that severance was necessary where a co-defendant had three times previously in open court, and apparently contrary to his own penal interest, voluntarily exculpated Echeles.

In *Washington*, this Court felt it necessary to caution that vindication of the right to secure the attendance of witnesses should not "be construed as disapproving testimonial privileges, such as the privilege against self-incrimination * * *." 388 U.S. at 23, n. 21.

The thrust of the allegation of prejudice resulting from the denial of the motion by Sachs and Curran to sever their trial from Kahn's is that, even if Kahn stood mute, they would have had "the valuable opportunity—specifically denied them by the trial judge below—to comment to the jury upon Kahn's unwillingness to testify * * *." (S. Pet. 9–10.) To begin with, we question whether an inference could be legitimately drawn from a co-indictee's desire to stand on his privilege. Furthermore, the circumstances of the instant case negate petitioners' contention that they have been prejudiced by their inability to comment on Kahn's failure to testify. Once again, the factual situation is critically different from that in the case on which they rely. In *DeLuna* v. *United States*, 308 F. 2d 140 (C.A. 5), there was a factual issue as to which of two occupants of an automobile had knowingly possessed the narcotics thrown from the car's window. De Luna (who was convicted) did not testify. His co-defendant (who was acquitted) did testify, and contended that De Luna alone was guilty, and his counsel commented repeatedly upon De Luna's failure to testify. All that the court held was that De Luna's privilege against self-incrimination was violated by the comments made by counsel for his co-defendant, and it accordingly reversed De Luna's conviction. The petitioners, however, seize upon the ob-

servation, clearly dictum, that if counsel's duty should require him to draw the jury's attention to the "possible inference of guilt" from a co-defendant's silence, then the judge would be obliged to order the defendants tried separately. Passing for the moment the fact that this proposition, like much dictum, was unsupported by reference to precedent or principle, it nevertheless does not advance petitioners' cause. Judge Wisdom was explicitly concerned with an inference of guilt to be drawn from silence. Even assuming such an inference might in some circumstances be tolerable where the co-indictee is being separately tried, the Fifth Circuit suggested the possibility only in a case presenting very different and far more compelling factors. There was a peculiar factual circumstance (similar to that in *Washington* v. *Texas, supra*) where only two persons had vital knowledge of the crime, and the defenses were in head-on collision, for if one witness were believed the other could not be. Thus counsel for the testifying defendant sought to suggest that sole guilt should be inferred from the refusal of the co-defendant to explain his conduct, thus exonerating the client. Here the situation is significantly distinguishable.

Sachs and Curran contended that they acted merely as attorneys for Kahn without fraudulent intent; this defense could not be aided by commenting on Kahn's failure to take the stand. The question was whether the documentary and other evidence introduced by the government, which these petitioners denied or attemped to explain away, justified an inference that

their participation in the various machinations was knowing. Kahn's silence neither added to nor detracted from the resolution of that issue, for his silence could not rationally suggest a motive to foist blame on Sachs and Curran by concealing his own guilt. Moreover, although Kahn was protected by the court's instruction that no inference could be drawn from defendant's failure to take the stand (S. App. 368), counsel for Sachs and Curran was permitted to refer to the fact that his clients had testified (S. App. 328, 330; Tr. 3787). It is apparent, then, that these two petitioners were not entitled to a severance.

Kahn's contention that the court abused its discretion by denying his requests for severance is equally without merit. He suggests no factors coloring this case that would not be applicable to any joint trial of co-conspirators, or principals and aiders and abettors. The nature of his defense—that he was innocently relying on the advice of counsel during the contrived dealings—made it especially improbable that the applicability of the evidence to specific defendants would be blurred in the minds of the jurors. His participation in the transactions was irrefutable.

2. *Instructions on credibility.* With varying emphasis and for varying reasons, both petitions attack the lengthy instructions given by the trial court (K. Pet. App. 11a–14a) on assessing the credibility of witnesses. We find no support whatever in the record for the assumption (K. Pet. 13–14) or assertion (S. Pet. 21) that the court was prompted to give the instruction because of matters coming to its attention in an *in camera* examination of pre-trial statements of

Sachs and Curran which the court refused to allow the government to use for impeachment purposes.[7] In any event, the factor that moves a trial judge to render an instruction would appear to be insignificant so long as the instruction is relevant to the issues and accurate in its import. This instruction certainly did not prejudice any of the defendants. While lengthy, it was correct and well balanced and applicable to all witnesses—government and defense alike (See K. Pet. App. 11a–14a, n. 5). It did not unduly single out the testimony of Sachs and Curran as meriting attention. Significantly, the court cautioned the jury to weigh the testimony of government witness Mary Burleson (Kahn's secretary and alleged co-conspirator) with greater care than an ordinary witness (S. App. 369). It was on her testimony that counsel for Sachs and Curran focused his attack on credibility (S. App. 334).[8]

3. *Refusal of instructions on reliance on attorney's advice.* Petitioner Kahn offered no evidence that he was acting in good-faith reliance upon the advice of counsel. In light of the absence of evidentiary founda-

[7] The court found the reports to be excluded by virtue of a pre-trial stipulation that the reports would not be used at trial.

[8] Petitioners were not improperly denied a mistrial when, on the second day of trial before any witness took the stand, their co-defendant, Joyce, entered a plea of guilty outside the presence of the jury as an aider and abettor under Count IV. The defendant Curran was not named in this count. When the court informed the jury of the bare fact of the plea, the jury was instructed that it was to determine the guilt or innocence of the other defendants without regard to the plea (Tr. 69–70), and this instruction was repeated at the close of the evidence (S. App. 355).

tion for this specific defense, the trial court did not err in refusing to render the proposed instruction that explicitly depended on the existence of such evidence (K. Pet. 14). See *Perkins* v. *United States,* 315 F. 2d 120, 124 (C.A. 9), certiorari denied, 375 U.S. 916; *United States* v. *Hickey,* 360 F. 2d 127 (C.A. 7), certiorari denied, 385 U.S. 928. In any event, the court's instructions did place the issue of good faith before the jury; the court repeatedly advised the jury that it could convict only if it found that the defendants acted with a specific purpose to violate the law, with knowledge of its prohibition, and not because of mistake, accident, etc. See *Beck* v. *United States,* 305 F. 2d 595 (C.A. 10), certiorari denied, 371 U.S. 890.

4. *Adequacy of the indictment.* There is no merit to petitioner Kahn's attack on the indictment as a pleading.

While the conspiracy count did not specify with exactitude Kahn's official positions with the federally insured institutions (as the substantive counts did), it did allege that he and the other petitioners exploited their fraudulent scheme "through their control of the management and operation" of the various institutions. (See K. Pet. App. 30a–31a). The count read as a whole, especially as detailed by the specification of some eighteen overt acts (K. Pet. App. 33a–35a), was adequate beyond peradventure to apprise petitioner of the conduct being challenged, to inform him of the contentions he would meet, and to protect him against further prosecution for the same offense. *Hagner* v. *United States,* 285 U.S. 427, 431.

Nor is there substance to the contention that various counts defectively failed to allege conversion to the petitioners' personal use. The substantive counts (see Counts III, IV, VII, charging misapplication under 18 U.S.C. 656, K. Pet. App. 35a–38a), alleged that Kahn and the other petitioners, as officers of federally insured institutions, wilfully misapplied funds by fraudulently disbursing specified amounts "well knowing," *inter alia*, that property pledged as security for the loan was grossly over-valued; that the loan would be used for the personal benefit and advantage of the petitioners; and that the loan was granted on the basis of a fraudulent letter of commitment. Compare *Ramirez* v. *United States*, 318 F. 2d 155 (C.A. 9). The court below properly held that these counts thus sufficiently alleged criminal conduct, not mere maladministration, and met the test of *United States* v. *Britton*, 107 U.S. 655, and its own decision in *United States* v. *Quinn*, 365 F. 2d 256 (C.A. 7).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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Petitioner,

vs.

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Respondent.

Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This petitioner, S. Lawrence Kahn, prays, in view of the extraordinary position taken by the co-defendants in their Petition, number 718 this term of Court, that this Reply be accepted by the Court in its consideration of his case.

Petitioner Kahn, in filing this Reply Brief, does not waive any of the matters, things and arguments contained in his original Petition.

I.

If the object be, as this Petitioner believes, that the ultimate goal of reviewing Courts under the judicial system of the United States, that each litigant receives a fair trial on the issues raised, then this Petitioner believes that from the outset of the prosecution he was not accorded the fair trial that he was entitled to under the Constitution.

Prior to trial Counts V, VI, VIII, IX, X and XI were dismissed as to Petitioner Kahn, yet evidence was admitted under the conspiracy count, which the Solicitor indicates in his Brief, footnote 3, page 3, was a major part of the conspiracy charge, as to Kahn.

Petitioner Kahn then found himself attempting to defend in a case where his co-defendants had been his lawyers in most of the matters presented as evidence in the Government's case. This resulted in the defenses being patently conflicting, yet the trial Court refused to grant a severance. The resulting trial was a continual attempt by the defendants Sachs and Curran (Petition # 718, pending this term) to exculpate themselves at the expense of Kahn. This Petitioner sought a severance constantly throughout the trial and although both the Attorney General and the Solicitor recognize in their briefs that the evidence showed Sachs and Curran were Kahn's attorneys, they argue that the burden was on him to show this and that he was not entitled to the instruction which he sought on this phase of his defense.

II.

The Solicitor gratuitously states there is no merit in Petitioner Kahn's points concerning the adequacy of the indictment, and in support of his argument concerning the conspiracy cites *Hagner* v. *United States*, 285 U.S. 427, 431. However, in this case this Court did say that the indictment must "* * * contain the elements of the offense intended to be charged", and does not as the Solicitor would argue hold that any vague and insufficient writing can stand as an indictment.

Respectfully submitted,

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SUPREME COURT, U. S.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INTRODUCTORY STATEMENT.

This case presents an important and recurring issue of criminal procedure that currently divides federal (and state) courts: Does the Sixth Amendment—or the Federal Rules of Criminal Procedure—require the granting of a defendant's timely motion to be tried separately from a co-defendant whose testimony is vitally needed, but who would invoke his Fifth Amendment privilege and refuse to take the witness stand at a joint trial? The present judicial conflict and confusion over this issue is understandable, for what it involves is no less than a clash between the Sixth Amendment's right to summon witnesses and the Fifth Amendment's privilege against self-incrimi-

nation. Some courts have "preferred" the Fifth Amendment and some the Sixth.

Petitioners are asking this Court to recognize a rule that requires no sacrifice of, or preference for, either Amendment: a rule—already specifically accepted by the Fifth Circuit but rejected in this case by the Seventh Circuit—that avoids unnecessary conflict between these two important constitutional rights by reducing (and only slightly) the convenience afforded by joint trials in a limited category of cases.

OPINION BELOW.

The opinion of the Seventh Circuit is not yet reported but is reproduced in the separate Appendix to the petition.

JURISDICTION.

The decision of the Seventh Circuit was rendered on June 29, 1967. A timely petition for rehearing or rehearing *en banc* was denied on September 12, 1967.

Jurisdiction to review the judgment below is conferred by 28 U. S. C. § 1254.

QUESTION PRESENTED.

Whether the Sixth Amendment right of compulsory process—or alternatively, Rule 14 of the Federal Rules of Criminal Procedure—requires that a separate trial be granted to a defendant who will testify, and urgently needs to call to the witness stand a co-defendant who has unique first-hand knowledge of all the facts but would refuse to take the stand at a joint trial.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED.

U. S. CONSTITUTION, AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

U. S. CONSTITUTION, AMENDMENT V:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

RULE 14, FEDERAL RULES of CRIMINAL PROCEDURE:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election for separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. . . ."

STATEMENT OF THE CASE.

(a) The Parties and the Indictment.

The petitioner Arthur B. Sachs is an attorney engaged in the general practice of law in Chicago; petitioner M. Prial Curran is also an attorney and is employed as an associate in Sachs' law office. Both Sachs and Curran have practiced law in Chicago for over 25 years.

Sachs and Curran were indicted together with an ex-client, S. Lawrence Kahn (who is not a party to this petition), for alleged violations of the banking laws (18 U. S. C. §§ 656, 657, 1006) and conspiracy to commit such violations (18 U. S. C. § 371). Kahn was a real estate developer and builder from Indiana; Kahn also owned a number of companies engaged in investment and financ-

ing activities in Indiana. In 1962 Kahn acquired controlling interest of the Chatham Bank of Chicago. Sachs, who had no prior connection or acquaintance with Kahn, was retained as attorney for the bank. Thereafter, Kahn also acquired, through his various companies and nominees, the Leyden and Equitable Savings and Loan Associations in Chicago; Sachs also became counsel for these institutions.

Although the original indictment contained 18 counts, several were dismissed prior to or after trial for various reasons. Of the remaining counts Sachs was named and convicted on ten, Curran on four and Kahn on six. Sachs and Kahn were sentenced to five years on each count, the sentences to run concurrently; Curran received concurrent sentences of two years on each count.[1]

(b) Kahn's Position and Role in the Transactions on Trial.

All of the counts in the indictment that were tried involved loans made by the Chatham Bank and the two Savings and Loan Associations acquired by Kahn; the loans were made either to companies owned by Kahn or to a person acting as Kahn's nominee. The proceeds of the loans were used to acquire the Savings and Loan Associations for Kahn and to repay prior loans. The indictment alleged that the loans were made without adequate security and were thus prohibited by Sections 656, 657 and 1006, 18 U. S. C. The government has conceded below that *neither Sachs nor Curran* ever personally received any of the proceeds of the questioned loans (Trial Transcript pp. 1991-2040, 3739).

---

1. After the trial and while the convictions were being appealed, the government filed motions to disbar Sachs and Curran from the practice of law in the District Court. These motions have been held in abeyance pending final disposition of the appeal.

Kahn was accordingly the central and principal figure in all of the transactions on trial. Kahn, his employees—and particularly his secretary, Mary Burleson—were present at, or supervised, all of the transactions and they prepared and executed the necessary documents to evidence security, appraisals, title and the like. Neither Sachs nor Curran was present at many (if not most) of the occurrences involved.

(c) The Nighttime Withdrawal of $991,900 in Checks From Leyden Savings and Loan Association by Kahn and His Secretary.

The single most important and dramatic episode disclosed at the trial was the clandestine withdrawal of $991,900 from Leyden Savings and Loan Association on the night of January 23, 1963. The withdrawal was accomplished by the writing of two checks for $616,900 and $375,000. Kahn, his secretary (Mary Burleson) and an officer of Leyden went to the Association after it was closed and drew the checks; both were made payable to companies owned by Kahn (but not represented by Sachs and Curran). *Neither Sachs nor Curran was present or had any knowledge of this occurrence until afterward.* (Trial Transcript pp. 802-805, 1997-99, 2641.) And, as we previously noted, Sachs and Curran did not receive any of the proceeds of these withdrawals or any of the other loans in question.

The substantive counts involving the surreptitious nighttime check-writing at Leyden (Counts 8, 9, 10 and 11) named Kahn and Sachs as defendants. These four counts were *dismissed as to Kahn* prior to trial; the trial judge sustained Kahn's contention that the counts did not sufficiently allege that he was an "officer, agent, employee or connected in any capacity with" Leyden, as required by

§§ 657 and 1006, 18 U. S. C. Accordingly, *Sachs alone* stood trial upon these counts; the court held that Sachs as attorney for Leyden had the requisite "connection with" the Association. The conspiracy count also alleged the drawing of these two Leyden checks as an overt act in furtherance of the alleged conspiracy.

(d) The Motions of Sachs and Curran for a Severance From Kahn.

Prior to trial, Sachs and Curran twice made a motion to be tried separately from the defendant Kahn. The specific grounds for the motions were:

(a) Sachs and Curran intended to waive the Fifth Amendment and testify at the trial but were advised that Kahn would *not* do so;

(b) Sachs and Curran urgently needed the testimony of Kahn to establish their defense of innocence to all the counts—and particularly those concerning Kahn's nighttime withdrawal of the two checks from Leyden Savings and Loan Association when neither Sachs nor Curran was present;

(c) If tried jointly with Kahn, Sachs and Curran would be denied the right to place Kahn upon the witness stand and examine him; and

(d) If tried jointly with Kahn, Sachs and Curran would be deprived of their right to comment to the jury on Kahn's refusal to testify.

The trial judge summarily denied the motions for severance and ordered a joint trial.[2]

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2. On the second morning of trial and before the opening statements were complete, the fourth co-defendant—Thomas Joyce—pleaded guilty to aiding and abetting Sachs and Kahn in the offense alleged in Count 4. The other substantive count against Joyce (Count 3) was then dismissed by the government, and Joyce was granted a

(Continued on next page)

At the trial both Sachs and Curran waived the Fifth Amendment and testified; both men were subjected to intensive cross-examination. (The trial judge later commented to the jury that the case "bristles with issues of veracity" and that in instances "too numerous to specify" the government's testimony was "flatly contradicted by the testimony of the defendants." App. 13.) Kahn for his part did not take the stand; Sachs and Curran thereupon filed still another motion for a severance from Kahn, which the trial judge denied. The trial judge then specifically prohibited counsel for Sachs and Curran from making any comment to the jury in the closing arguments concerning Kahn's failure to take the stand.[3]

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severance from the conspiracy count. Petitioners immediately moved for a mistrial because Joyce's plea of guilty to aiding and abetting would compellingly imply the guilt of the alleged principals, and because a new trial could be started with a minimum of inconvenience to the government. The trial court denied the motion and promptly informed the jury of Joyce's guilty plea. (See p. 22, *infra*.)

3. The trial judge in instructing the jury also made no comment concerning Kahn's failure to testify. In marked contrast, however, the trial judge gave a most protracted and unusually repetitious instruction warning against the credibility of any witnesses having a direct or personal interest in the outcome of the case. (This instruction is reproduced in the footnote in the Seventh Circuit's Opinion, commencing at p. 12 of the Appendix hereto and ending at p. 17.) For example, the instruction cautioned that, "Where a witness has a strong personal interest in the outcome of a trial, the temptation may be strong to color, pervert or withhold the facts, or even though completely honest, a witness who has an interest in the case may unconsciously shade his testimony." (App. 16).

The defendants Sachs and Curran were the only witnesses having a direct and personal interest in the outcome. The trial judge admittedly gave the extended credibility instruction *sua sponte* and as a result of certain F. B. I. interview reports that the judge examined *in camera* at the trial; petitioners to this day have never had an opportunity to examine these documents. (See pp. 21-22, *infra*.)

REASONS FOR GRANTING THE WRIT.

The Court Should Grant the Petition to Resolve an Important Conflict Among Circuits (and State Courts) as to Whether a Severance Should Be Granted to Enable a Defendant, Who Intends to Testify, to Call to the Stand a Co-Defendant Having Peculiar Knowledge of the Matters on Trial But Who Would Refuse to Testify At a Joint Trial.

Motions for severance in the past have often been prompted by a desire to *exclude* evidence (such as a confession) because its admission against one defendant at a joint trial might prejudice another defendant. [See *Delli Paoli* v. *United States*, 352 U. S. 232 (1957); Orfield, "Relief from Prejudicial Joinder in Federal Criminal Cases," 36 Notre Dame Law, 276, 495 (1961).] This case presents another critical aspect of the severance problem, petitioners here moved for a severance in order to *introduce*, rather than exclude, relevant evidence, *i.e.*, the testimony of a co-defendant having detailed and first-hand knowlegde of the facts, but who would refuse to take the stand at a joint trial. The issue thus presented involves a serious and recurring clash between the Sixth Amendment right to call witnesses—recently given new dimension in *Washington* v. *Texas*, 388 U. S. 14 (1967)—and the Fifth Amendment privilege against self-incrimination [see *Griffin* v. *California*, 380 U. S. 609 (1965).]

At a separate trial the petitioners Sachs and Curran would unquestionably have been able to exercise their Sixth Amendment right to call Kahn to the witness stand. Kahn had peculiar and intimate knowledge concerning all the transactions charged in the indictment, and his testimony was vitally needed to establish Sachs' and Curran's defense of no knowledge of or participation in the alleged

offenses. See *United States* v. *Seeger*, 180 F. Supp. 467 (S. D. N. Y. 1960). Kahn might well have been willing to testify fully at a separate trial.[4] Even if he would not, Kahn could have been compelled by the trial judge to testify on all *non*-incriminating subjects.[5] Moreover, even if Kahn were permitted to plead the Fifth Amendment to all questions, petitioners would still have had the valuable opportunity—specifically denied them by the trial judge below—to comment to the jury upon Kahn's unwilling-

4. There are many cogent reasons why a defendant would not want to testify at his own trial, but would be entirely willing to testify at a separate trial where his own guilt or innocence was not at issue. The difference in position is implicitly recognized by the rule that a defendant has an absolute right not to take the stand at his own trial, but has only a limited right not to answer particular incriminating questions at someone else's trial. See *Hoffman* v. *United States*, 341 U. S. 479 (1951). Conversely, once a defendant takes the stand at his own trial—for whatever purpose—he exposes himself to questioning about his own involvment in the crime charged against him. *E.g.*, *Caminetti* v. *United States*, 242 U. S. 470 (1917). This double-edged rule has the effect of excluding much relevant evidence at a joint trial that would be available at separate trials.

5. *Hoffman* v. *United States*, 341 U. S. 479 (1951); *Rogers* v. *United States*, 340 U. S. 367 (1951). Thus, at a separate trial Kahn could not arbitrarily refuse to answer any and all questions (as he could at a joint trial) but would have to show the court the probable incriminating tendency of particular questions. In this regard the necessity of putting Kahn on the stand was especially important to the petitioners, since Kahn was dismissed from Counts 8, 9, 10 and 11 involving the dramatic nighttime withdrawal of $991,900 in checks from Leyden Savings and Loan Association when the petitioners were concededly not present and claimed unawareness of the episode (see Statement of the Case, *supra*, pp. 5-6). The result of the government's insistence on a joint trial was to exclude absolutely from the jury's consideration any and all testimony by Kahn as to this critically important transaction (and, of course, all other transactions on trial).

ness to testify (in contrast to the petitioners' willingness to testify).[6] Plainly, by denying separate trials, the trial court and the Seventh Circuit abrogated Sachs' and Curran's Sixth Amendment rights in favor of Kahn's Fifth Amendment rights.[7] And it did so although no choice of either right was necessary, since the less serious alternative of severance was readily available.

The result below is in plain effect indistinguishable from the denial of Sixth Amendment rights condemned in *Washington* v. *Texas*, 388 U. S. 14 (1967). In that case a statute disqualified "participants" in the same alleged crime from being called as witnesses for co-participants, "although

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6. The force of inferences from a refusal to testify has often been acknowledged by the courts. When a defendant takes the stand but then refuses to answer certain questions, the prosecution may comment to the jury on his refusal. *Caminetti* v. *United States*, 242 U. S. 470, 492-95 (1917). When he fails to answer accusations of crime, his failure has long been acknowledged to be probative. *Sparf and Hansen* v. *United States*, 156 U. S. 51, 56 (1895); *People* v. *Smith*, 25 Ill. 2d 219, 184 N. E. 2d 841 (1962); Note, 31 Chi. L. Rev. 556, 557 n. 13 (1964). And his refusal to testify about incriminating matters has been held to be weighty evidence in civil cases. *Hansel* v. *Purnell*, 1 F. 2d 266 (6 Cir. 1924), cert. denied, 266 U. S. 617; *Duratron Corp.* v. *Republic Stuyvesant Corp.*, 1 Crim. L. Rptr. 2209 (N. J. App. Div. 1967); 8 Wigmore, *Evidence*, 439 & n. 14 (McNaughten rev. 1961). It is not surprising, therefore, that several courts have concluded that a defendant has an absolute, constitutional right to comment on his co-defendants' failure to testify. *de Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962) (Wisdom, J.); *People* v. *Hannon*, 50 Misc. 2d 297, 270 N. Y. S. 2d 327 (Spec. Term 1962). See *Hayes* v. *United States*, 329 F. 2d 209 (8 Cir.), cert. denied, 377 U. S. 980 (1964); *United States* v. *Berman*, 24 F. R. D. 26 (S. D. N. Y. 1959).

7. Kahn in fact was accorded *both* his Fifth *and* Sixth Amendment rights at the joint trial, since he suffered no comment to the jury concerning his failure to testify and had full opportunity to examine Sachs and Curran when they voluntarily assumed the witness stand.

there was no bar to their testifying for the state." This Court, in holding the statute unconstitutional, declared:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law." (388 U. S. at 19.)

Here, as there, petitioners were prevented from presenting evidence of a co-defendant that "would have been relevant and material" and "was vital to the defense." (388 U. S. at 16.) Here, as there, the co-defendant "knew exactly who" had participated in the relevant transactions. (*Ibid.*) And here, as there, the government could have arranged to call the co-participant to the witness stand if it wished by simply making the unreviewable decision to hold separate trials. The petitioners, however, had no such alternative. Indeed, the parallels between *Washington* and this case are so striking[8] that if the decision below is permitted to stand, the very result condemned in *Washington* can still be accomplished by the simple device of joining alleged co-participants together at one trial; the important principle announced in the *Washington* case could thus be easily circumvented.

The Fifth *vs.* Sixth Amendment dilemma presented in this case is a quandary that is arising in criminal trials with all too-increasing frequency; lower courts throughout the country are reaching divergent results, and now as a

8. To be sure, in *Washington* there was some indication in the record that the co-participant would have willingly testified for Washington; while here there is no specific indication in the record. But the willingness of the witness to testify cannot be deemed relevant under the Sixth Amendment's "compulsory process" language, which clearly contemplates a right to subpoena unwilling as well as willing witnesses.

result of the decision below there exists a flat conflict between Circuits.

A. The Petition Should Be Granted to Resolve the Conflict Between the Fifth and Seventh Circuits.

The decision below in this case is in direct conflict with the decision of the Fifth Circuit in *de Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962), rehearing denied, 324 F. 2d 375 (1963). In both cases the courts formulated rules covering the identical situation: where co-defendants have "inconsistent" defenses (App. 28); where one defendant intends to testify while another intends to invoke the Fifth Amendment and remain silent; and where "an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence" (308 F. 2d at 141). The rules announced by the two circuits are, however, diametrically opposed. The *de Luna* Court announced the following prophylactic rule for the Fifth Circuit:

> "In a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they come only from a co-defendant's attorney. If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, *the trial judge's duty is to order that the defendants be tried separately.*" (308 F. 2d at 141; emphasis added.)

The Seventh Circuit—calling this rule "dicta"—rejected the Fifth Circuit's basic right to severance in the following terms:

> "The procedural difficulties and the complication of joint trials arising from the rule suggested by dicta in *de Luna* are so great that we cannot say there is an absolute right, without reference to the circumstances of defense at trial, for a defendant to comment on the

> refusal of a co-defendant to testify. We think there must be more to justify the disintegration of a trial, such as a conspiracy trial, in which there is a cohesion of crime alleged, defendants charged, and proof adduced. *There must be a showing that real prejudice will result from the defendant's inability to comment.*"[9] (App. 27; emphasis added.)

The Fifth Circuit's rule has not been read as "dicta" by the District Courts in that Circuit;[10] those courts are regularly following the declared rule of *de Luna*. The United States Attorney himself so announced to the Fifth Circuit in unsuccessfully urging rehearing of the *de Luna* case:

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9. The Seventh Circuit thus adopted the view of the dissenting judge in the *de Luna* case, 324 F. 2d at 376.

10. The only distinction between *de Luna* and this case —and a distinction that is entirely irrelevant for purposes of determining whether there is a conflict—simply reflects the procedural postures in which the cases came before the Courts of Appeals. In *de Luna*, the trial judge had *permitted* the co-defendant's attorney to comment on de Luna's failure to take the stand; here the trial judge had *forbidden* such comment. Thus in *de Luna*, the court was asked to decide whether the non-testifying defendant's rights had been violated; here the testifying defendants' rights were at stake. There can be no doubt that if *de Luna* had arisen in the same procedural posture as this case—if the trial judge in *de Luna* had forbidden comment as did the trial judge here—the *de Luna* Court would have reversed his co-defendant's conviction. Indeed, the *de Luna* Court makes that crystal clear:

> "And considering the case from Gomez's point of view his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Gomez has rights as well as de Luna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from de Luna's absence from the stand." (308 F. 2d at 143.)

> "[The case has] already had a significant effect on joint trials in the Western District of Texas in that joint trials have been and are now automatically severed and not permitted within the San Antonio, Austin and Waco Division." Petition for Rehearing, p. 21, *de Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962).

The present situation, therefore, is one of vexing and unresolved conflict: in the Fifth Circuit, defendants in petitioners' plight would have been granted a severance; while in the Seventh Circuit, "severance should not be granted except for the most cogent reasons." (App. 23.)

B. The Writ Should Be Granted Because the Severance Question Has Also Engendered Conflict and Confusion Among Other Circuit, District and State Courts.

In addition to the sharp conflict between important Circuits over a critical rule of constitutional-criminal procedure, there is widespread disagreement and confusion among other Circuits, federal district courts and state courts at every level over the standards to be applied in deciding motions for severance. [For a most recent survey and documentation of this conflict, see *Joinder of Defendants in Criminal Prosecutions*, 42 N. Y. U. L. Rev. 513, esp. at 519-20, 525-27 (May, 1967).]

For example, in *People* v. *Hannon*, 50 Misc. 2d 297, 270 N. Y. S. 2d 327 (Sup. Ct. Spec. Term, 1966) the court held—on facts virtually identical to those here—that a severance was required. In *Hannon* three defendants were jointly indicted for conspiracy and perjury. Exactly as in this case, two defendants moved before trial for a severance from the third defendant. The moving papers stated that the two defendants intended to testify in their own behalf; that they desired to call the co-defendant to the stand; and that they wished to comment to the jury upon the co-defendant's silence in the event of his refusal

to testify. In holding that the defendants were entitled to a severance, the court—after a careful review of the authorities—specifically followed the rule announced in the *de Luna* case (but which the Seventh Circuit has rejected in this case). The *Hannon* court declared:

> "In short, as was pointed out in *De Luna* v. *United States* (308 F. 2d 140, 154, 155) (and followed in *United States* v. *Echeles,* 352 F. 2d 892, 897), in order for the defendants to see the face of justice, there must be a separation of the trials.
>
> "My perception of and judicial sense of duty to follow the course that should be taken here are derived from a persuasion that the authorities, *both State and Federal,* point out—if indeed they do not mandate—the direction that a sound exercise of judicial 'discretion' should take in disposing of these motions under the statute (Code Crim. Pro., § 391), for *I am frank to say that I would feel constrained to grant a separation of trials (as herein indicated) on constitutional grounds,* even if no statutory authority for such action existed." (50 Misc. 2d at 302; emphasis added.)

Compare *People* v. *Massie,* 59 Cal. Rptr. 733, 428 P. 2d 869, 879-86, esp. p. 886 n. 31 (Tobriner, *J.*).

Lower courts (both federal and state) are also in disagreement as to whether, and to what extent, a defendant must show that his co-defendant will testify only at a separate trial and that the testimony will be helpful. Some courts have granted severance without any such showing. *E. g., United States* v. *Valdes,* 262 F. Supp. 474 (D. Puerto Rico, 1967); *People* v. *Hannon, supra.* And see *United States* v. *Gleason,* 259 F. Supp. 282 (S. D. N. Y. 1966); *United States* v. *Seeger,* 180 F. Supp. 467 (S. D. N. Y. 1960). Other courts have required proof that a co-defendant is more likely to testify at a separate trial, *United States* v. *Kahn,* 366 F. 2d 259 (2 Cir. 1966) cert. denied, 385 U. S. 948; *Kolod* v. *United States,* 371 F. 2d 983 (10 Cir. 1967), cert. petition filed 5/5/67 (No. 1360), and/or that his

testimony would exonerate the defendant who called him, *State* v. *Adams,* 181 Neb. 75, 147 N. W. 2d 144 (1966); see *Olmstead* v. *United States,* 19 F. 2d 842 (9 Cir. 1927), aff'd on other grounds, 277 U. S. 438 (1928). See also *United States* v. *Berman,* 24 F. R. D. 26 (S. D. N. Y. 1959); *People* v. *Massie, supra,* p. 15.

In the present case, the Seventh Circuit adopted the most stringent of all tests; it conceded that Sachs' and Curran's defense "was inconsistent with that of Kahn," but denied them a severance (and the right to comment on Kahn's failure to testify) because (a) the defenses were not "mutually exclusive," and (b) petitioners had not submitted proof that Kahn would testify in their behalf at a separate trial.[11]

These two requirements, however, are themselves mutually exclusive and contradictory, when judged from any realistic or practical standpoint. It would be the extremely rare—if not unheard of—case where co-defendants throw the *whole blame* on each other, and yet one obliges the other with a pre-trial statement *absolving* the other from blame. The more usual and likely case, and the one where the need for Sixth Amendment "compulsory process" is greatest, is when (as in the instant case) a

11. The Seventh Circuit distinguished its prior case of *United States* v. *Echeles,* 352 F. 2d 892 (1965), on the ground that Echeles' co-defendant had made oral statements before trial tending to exonerate Echeles. The government urged in that case that the co-defendant still might refuse to testify at a separate trial, despite his earlier statements. The Seventh Circuit rejected that argument as "speculation"; it held that Echeles "should not be foreclosed of the *possibility* that [the co-defendant] would testify in his behalf *merely because that eventuality was not a certainty.*" (353 F. 2d at 898; emphasis added.) In *Echeles* the Seventh Circuit also cited with strong approval the *de Luna* holding that the right to comment on a co-defendant's refusal to testify must be protected. Clearly, the Seventh Circuit in this case has abandoned both of these grounds of the *Echeles* severance holding.

testifying defendant desires to call a co-defendant who will not take the stand at a joint trial, the defenses are inconsistent, and there is no *guarantee* that the co-defendant will give exculpatory testimony at a separate trial. If the co-defendant *fails* to give exculpatory testimony, the government is not harmed (and indeed, may be substantially helped), and in any event, the Sixth Amendment right of compulsory process will have been fully protected. Our research has disclosed no case (other than the decision below) construing the Sixth Amendment to apply only where there are mutually exclusive defenses and where there is a showing that the desired witness will willingly give testimony that tends to absolve the defendant.

C. The Court Should Determine Whether the Denial of Sixth Amendment Rights Is Outweighed by a General Allegation of "Inconvenience."

Although it is clear that the petitioners could have exercised their Sixth Amendment right to summon Kahn to the stand at a separate trial, the government asserted below—as it usually does in such cases—that separate trials would have been inconvenient.[12] The Seventh Circuit uncritically accepted this general assertion and justified the denial of

12. It is noteworthy that at least twelve states are unimpressed by this alleged inconvenience; they give all defendants, or all felony defendants, separate trials as a matter of right. [Code of Ala., tit. 15, § 319; Ga. Code Ann. § 27-2101; Iowa Code Ann., tit. 36, § 780.1; Kansas Stats. Ann. § 62-1429; Minn. Stats. Ann. § 631.03; Miss. Code Ann. § 2514; Mo. Ann. Stats. § 545.880 (except for some rape and sodomy trials); Okla. Stats. Ann., tit. 22, § 838; Ore. Rev. Stats. tit, 14, § 136.060; Verm. Stats. Ann., titl. 13, § 6507 (but only if 5 year sentence possible); Code of Virg. § 19.1-202; Wyo. Stats. § 7-230.]

There is no evidence that prosecutors and criminal courts in these states are more burdened than in other states with docket congestion or other inconvenience as a result of the right to severance.

severance upon the ground of "*possible* prejudice to the Government which *might* result from a separate trial." (App. 23; emphasis added.) This stock argument (rarely accompanied by any particulars) has become a platitude that should now be rejected by this Court. The Sixth Amendment does not provide that a defendant has the right to summon witnesses only when it will be convenient to the prosecutor; it provides that the defendant "*shall* enjoy the right" in "*all* criminal prosecutions." (Emphasis added.) See *Washington* v. *Texas*, 388 U. S. 14 (1967); *In re Oliver*, 333 U. S. 257 (1948); *Greenwell* v. *United States*, 317 F. 2d 108 (D. C. Cir. 1963).

In balancing away the petitioners' Sixth Amendment rights in favor of alleged convenience to the government, the Seventh Circuit stated that petitioners had failed to make a showing of "real prejudice" from the denial of severance. We submit that Sachs and Curran were palpably prejudiced by being tried with Kahn in light of the facts that:

First, Kahn was the key figure in all the transactions on trial and had peculiar knowledge that was critical to petitioners' defense of innocence (particularly concerning the four counts that involved the nighttime check-writing for $991,900 when neither Sachs nor Curran was present but Kahn was);

Second, the petitioners both took the stand and fully testified as to their lack of knowledge and participation in all the offenses alleged;

Third, the trial judge himself acknowledged (in instructing the jury) that the case "bristles with issues of veracity" (App. 13), and the outcome of the case vitally hinged on credibility; and

Fourth, Kahn was the only witness having personal knowledge of the facts who was not called to the witness stand.

On this record it is unjust and illogical to simply label the denial of Sachs' and Curran's Sixth Amendment rights as "non-prejudicial" or "harmless error". Moreover, as this Court held last term in *Chapman* v. *California*, 386 U. S. 18 (1967), the burden of proving that a constitutional deprivation is *not* prejudicial is upon the *prosecution*, and the lack of prejudice must be proved *"beyond a reasonable doubt."* (386 U. S. at 24; emphasis added). Here the Seventh Circuit has held exactly the opposite by requiring the defendants to demonstrate prejudice, in order to outweigh an unsupported general assertion of inconvenience to the government.

Assuming, *arguendo*, that inconvenience to the prosecution can properly be weighed against defendants' constitutional rights, we submit the prosecution should be required to do more than simply voice the plaint of general inconvenience as it did below. Here, as Judge Marvin Frankel observed in a recent scholarly opinion holding that a severance was required in *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580, 595 (S. D. N. Y. 1967), the prosecution "submitted nothing to the trial court—and, forsooth, argues nothing here—that suggests *special reasons* for opposing severance when the reasons for allowing it were so obvious and obviously substantial." (Emphasis added.)

The instant case clearly provides this Court with the opportunity to articulate a rule, such as that adopted by Judge Frankel, requiring the government to show "special reasons" (other than general allegations of inconvenience) for denying severance where it appears that a joint trial will result in the sacrifice of a defendant's constitutional rights.

Unless this Court requires the government to allege more than general inconvenience, the decision whether to try co-defendants jointly or separately will, in practice, be

delegated to the prosecutor, who makes the initial decision whether to try defendants separately or jointly. And there is no reason to believe that the prosecutor's decision is made in a judicial manner by carefully balancing convenience to the government against prejudice to the defendants. Indeed, there is some disturbing evidence that prosecutors consider the possibility that a defendant will testify for a co-defendant at a separate trial as an argument *in favor* of a joint trial. See *People* v. *Caparelli*, 21 App. Div. 2d 882 (1964).

D. Special and Compelling Circumstances Favor a Grant of the Writ.

In addition to the Circuit and lower court conflict over the severance issue (and the clash between Fifth and Sixth Amendment rights), there are important factors present that enhance the worthiness of the case for plenary review. The case presents the Court with a particularly good record for consideration of the severance question; the point was adequately asserted by petitioners at every stage below. Since this case is a federal one, the question can be considered and decided under the Constitution or the Federal Rules of Criminal Procedure.[13]

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13. Even if the Court declines to decide that the Sixth Amendment requires severance in the circumstances of this case, it should decide—under its supervisory power over the federal judiciary—that the language of Rule 14, F. R. Cr. P., requires severance. In the federal courts joinder and severance are now governed not by legislation but by the rules promulgated and construed by this Court. In light of the now-prevailing confusion and conflict, this Court should delineate uniform standards for the federal courts to apply in deciding motions for severance. "In order to implement the purpose of Rule 14, guidelines must be developed by which the trial court can exercise its discretion, and by which the Appellate Courts may review that exercise." *Joinder of Defendants in Criminal Prosecutions*, 42 N. Y. U. L. Rev. 513, 520 (May 1967).

Moreover, there are special and aggravating factors present in this case that clearly highlight the importance and necessity of resolving the severance problem in order to prevent injustices:

First: Sachs and Curran both waived the Fifth Amendment and testified at the trial. Kahn refused to do so and suffered no comment to the jury either by counsel for the other parties or the trial judge. By being jointly tried with Kahn, Sachs and Curran not only lost their rights under the Sixth Amendment to call Kahn to the witness stand and to comment to the jury if he refused to testify, but they were also burdened with a lengthy and repetitious instruction disparaging their credibility.[14] (This highly unusual instruction is set forth in full in the Seventh Circuit's opinion. App. 12-17.) The trial judge admittedly gave this instruction as a result of hearsay F. B. I. reports of confidential interviews of Sachs and Curran prior to the indictment; the government had stipulated in writing that it would not introduce these F. B. I. reports at the trial, but then attempted to get them before the jury no less than five separate times.

The government handed the F. B. I. reports to the trial judge who retained and examined them *in camera* during Sachs' and Curran's testimony. After the trial, the judge stated that he believed the F. B. I. reports were "inconsistent" with Sachs' and Curran's testimony and he therefore had given the extended and *sua sponte* credibility instruction warning against the testimony of witnesses having a personal interest in the outcome. When counsel for Sachs and Curran then again requested to inspect the F. B. I. reports, the trial judge refused and ordered the F. B. I. reports to be sent up to the Court of Appeals in a sealed rec-

14. See Statement of the Case, *supra*, note 3, p. 7.

ord.[15] (To this day we have never had the opportunity to examine, explain or rebut the *ex parte* F. B. I. reports.) Clearly, the extended credibility instruction placed an additional onus upon Sachs and Curran that was not suffered by the non-testifying co-defendant, Kahn, at the joint trial.

Second: Sachs and Curran had also moved before trial for a severance from the fourth defendant, Thomas Joyce; this too was denied. On the second morning of trial and before any evidence had been presented, Joyce claimed illness and said he wished to enter a plea pursuant to an understanding with the government. The trial judge allowed Joyce to plead guilty to aiding and abetting Sachs and Kahn in the commission of the offense alleged in Count 4; Sachs and Kahn were charged as principals in Count 4. Joyce was granted a severance from the conspiracy count; the other substantive count against him was dismissed.[16] Petitioners then moved for a mistrial—in effect a severance, since it would result in a new trial separate from Joyce and without the adverse effects of his guilty plea. The trial judge denied the motion; he then informed the jury of Joyce's plea of guilty to aiding and abetting Sachs and Kahn and requested the jury to "disregard" that plea as to the other defendants. However, in the

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15. The pertinent colloquy between the trial judge and counsel for Sachs and Curran was:

"The Court: No, I don't think that you will have any opportunity to see them in camera, no.

"Mr. Kirby: Well, how can I vest myself—

"The Court: The Court of Appeals may take a look at them, but you are not going to take a look at them." (Appendix for Sachs and Curran in Court of Appeals, p. 389.)

16. See Statement of the Case, *supra*, note 2, pp. 6-7. Joyce subsequently received a suspended sentence on Count 4 and was never tried on the conspiracy count.

final instructions to the jury, the trial judge in defining the crime of aiding and abetting declared that the principals must be found guilty if the aider and abetter is guilty.

Although we do not assert that the F. B. I.-prompted credibility instruction and the guilty plea of Joyce would, standing alone, constitute grounds for seeking certiorari, we do contend that these occurrences keenly and graphically demonstrate the vices that can and do flow from denying a severance in a case such as this one.

CONCLUSION.

For the foregoing reasons, we submit that the petition should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ARTHUR B. SACHS AND M. PRIAL CURRAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

Opinion of the U. S. Court of Appeals for the Seventh Circuit.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* S. LAWRENCE KAHN, ARTHUR B. SACHS and M. PRIAL CURRAN, *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 29, 1967

Before HASTINGS, *Chief Judge,* and SWYGERT and FAIRCHILD, *Circuit Judges.*

HASTINGS, *Chief Judge.* We consider separate appeals by S. Lawrence Kahn, Arthur B. Sachs and M. Prial Curran from their convictions, following a jury trial in the district court, upon jury verdicts of guilty.

Kahn, and Sachs and Curran, attorneys for Kahn, were indicted with others as conspirators in a scheme to illegally use moneys of a number of federally insured banks and savings associations for their personal benefit. In addition to the conspiracy count, the defendants were charged in a number of other counts as principals or as aider-abettors in

illegally misapplying funds deposited in federally insured institutions.[1]

Kahn and Sachs were each sentenced to serve five years on a number of separate counts of the indictment, the sentences to run concurrently. Curran was sentenced to two years on each of a number of counts, the sentences to run concurrently.

The sufficiency of the evidence is not challenged. Since we are not required to review the evidence for its sufficiency, only the essential nature of the Government's case need be shown.

The evidence put on by the Government, which the jury could have believed, tended to show that this was a case of untrustworthy men in trust; of loans without security, mortgages without property, checks without funds; of grossly unrealistic appraisals of real estate; of emptied banks acquired for their tills; of furtive manipulation and deceit. All this, in an accelerating necessity of acquisition, by taking from one bank as Peter to pay another as Paul, a pace in front of examiners, and a suspicion ahead of interested parties, to the ultimate benefit of defendants.

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1. The full indictment contained eighteen counts. A number of these were dismissed. In addition, the Government on appeal suggests that we not consider the sufficiency of the participation counts, and we have not done so. The remaining counts of the indictment, on which defendants were convicted and which we have considered, are set out in the appendix.

Kahn was indicted in seventeen counts, eleven of which were dismissed. He was found guilty on the remaining counts, counts I, III, IV, VII, XVI and XVII.

Sachs was charged in seventeen counts, seven of which were dismissed. He was found guilty on the remaining counts, counts I, III, IV, VII, VIII, IX, X, XI, XVI and XVII.

Curran was indicted in eight counts, four of which were dismissed. He was found guilty on the remaining counts, counts I, III, XVI and XVII.

On appeal, defendants contend that the trial court committed error in many respects. Sachs and Curran urge that the indictment is fatally defective in its substantive counts as well as in its conspiracy count. They claim that the trial court gave a prejudicial credibility instruction and that they were prejudiced by the trial court's failure to give a "La Buy" instruction concerning lying witnesses. They further contend that the trial court should have granted a mistrial when a co-defendant, Thomas Joyce, pleaded guilty in the early stages of the trial as an aider and abettor. Finally, they assert that prejudicial error was committed by the trial court's refusal to grant them a severance from Kahn.

In Kahn's appeal, in addition to the above contentions respecting the defectiveness of the indictment, the joinder of defendants and the mistrial upon Joyce's plea of guilty, which he also urges, Kahn claims that there was an improper joinder of counts, that the trial court erred in not giving a certain instruction as his theory of defense, and that irrelevant and immaterial evidence was wrongly admitted at trial.

Sufficiency of the Indictment.

At the outset of our consideration, we note that we do not suffer the inability of the antique common law "to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." *Paraiso* v. *United States,* 207 U. S. 368, 372 (1907). Indictments are read for their clear meaning, and convictions are not reversed because of minor deficiencies which did not prejudice the accused. *Smith* v. *United States,* 360 U. S. 1, 9 (1959).

It is not necessary in a conspiracy indictment to allege with precision all the elements essential to the offense which is the object of a conspiracy; allegations clearly

identifying the offense defendants conspired to commit are sufficient. *Wong Tai* v. *United States,* 273 U. S. 77, 81 (1927).

The test for the sufficiency of an indictment is "whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a formal acquittal or conviction.' " *Hagner* v. *United States,* 285 U. S. 427, 431 (1932); *United States* v. *Airdo,* 7 Cir., ... F. 2d ..... (June 19, 1967).

The last two conditions of the test are not equivalent to the first, for the first establishes what must be proved, that combination of elements without which there is no crime alleged. Whether the elements are sufficiently alleged does not depend upon nice attention to technicality or formulistic recitals. "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by their fair construction can be found within the terms of the indictment." *Hagner* v. *United States, supra* at 433. *Cf.* Rule 52(a), Federal Rules of Criminal Procedure, 18 U. S. C. A.

While *Hagner* may be distinguished by the fact that it was concerned with a post verdict attack upon an indictment, its reasoning is applicable to indictments attacked before verdict, as long as no prejudice to defendants is shown in the indictment.

It is, however, in an asserted incomplete allegation of elements that defendants attack the sufficiency of the indictment.

The defendants contend that the first count of the indictment, the conspiracy count, is fatally defective because it contains no allegation that any of the alleged conspirators

was connected in any capacity with any of the institutions named in the count.

Count I, brought under § 371, 18 U. S. C. A., alleges a conspiracy to violate §§ 656, 657, 1001, 1005, and 1006, 18 U. S. C. A. Of these statutes, only § 371, which prohibits conspiracy to commit an offense or to defraud the United States, and § 1001, which relates to false and fraudulent statements, do not require that the alleged offender be "an officer, agent or employee of or connected in any capacity" with federally authorized or protected financial institutions. The substantive count of the indictment relating to § 1001, count XVIII, was dismissed. Defendants assert, therefore, that the § 1001 reference in count I cannot cure the failure of the count to allege the requisite capacity called for in the remaining four substantive statutes.

Count I, however, does allege that defendants controlled the management and operation of certain named financial institutions. In addition, it alleges certain overt acts in furtherance of the conspiracy; and some of the charged overt acts note certain official connections with the financial institutions named in the indictment.

These read as follows:

"3. On or about November 1, 1962 at Chicago, Illinois, S. Lawrence Kahn *presided* at a meeting of the Executive Committee of the Chatham Bank of Chicago.

• • •

"10. On or about December 20, 1962 M. Prial Curran executed an escrow agreement as *escrow agent* for Chatham Bank of Chicago relating to the sale of permanent reserve shares of Equitable Savings and Loan Association.

• • •

"14. On or about February 19, 1963 at Chicago, Illinois Rudy Weinberg was elected Secretary-Treasurer and Arthur B. Sachs appointed *General Counsel* of

> Equitable Savings and Loan Association by the Board of Directors of Equitable Savings and Loan Association." [Emphasis added.]

Defendants, however, citing *Pettibone* v. *United States*, 148 U. S. 197 (1893); *Brenner* v. *United States*, 2 Cir., 287 F. 636 (1922); *United States* v. *Devine's Milk Laboratories, Inc.*, D. Mass., 179 F. Supp. 799 (1960), assert that allegations of overt acts cannot cure an inadequacy in a conspiracy indictment.

In *Pettibone, supra* at 203, the Supreme Court said:

> "* * * the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

The strictness of *Pettibone* was eroded, however, in *Hyde* v. *United States*, 225 U. S. 347 (1912) where the Court interpreted § 5440 of the Revised Statutes, the present § 371 conspiracy statute, which in its critical language reads exactly as § 5440 did.[2] It was stated that while at common law it was not necessary to aver or prove an overt act, § 5440 did require, as does §371, some act to effect the conspiracy. Consequently, an overt act was required to be alleged along with conspiracy to constitute the offense under the federal statute.

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2. The pertinent language of § 5440 reads:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable * * *."

Section 371 reads in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined * * *."

Since an overt act is part of the offense, we see no reason why it may not be used to clarify the remainder of the count. This reading of the count as a whole is in accord with modern practice in reading indictments.[3] *Cf. Smith, supra*; *Hagner, supra; Rule* 52(a), *supra.*

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3. *Hyde* was concerned with a construction of a conspiracy count for purposes of venue, and it may be supposed that it does not concern itself with the essential elements of the crime of conspiracy, but only with where a conspiracy may be deemed to have taken place, for purposes of venue. This belies the language of *Hyde,* which directly states that an overt act is a requisite element of conspiracy.

It is an anomaly that an indictment charging a conspiracy must charge an agreement to commit an offense, the object of the conspiracy, and an overt act, *United States* v. *Offutt,* D. C. Cir., 127 F. 2d 336 (1942), but that allegations under the title of overt acts supposedly may not be resorted to in order to clarify the language charging conspiracy, *United States* v. *Knox Coal Company,* 3 Cir., 347 F. 2d 33 (1965), cert. den., 382 U. S. 904 (1965); *Reno* v. *United States,* 5 Cir., 317 F. 2d 499 (1963), cert den., 375 U. S. 828 (1963). We have searched for the reason for this anomaly, but have found none other than dead forms ruling from the grave.

The *Knox* and *Reno* cases, which simply state a rule concerning allegations of overt acts, rely upon *Joplin Mercantile Co.* v. *United States,* 236 U. S. 531 (1915). The concern of *Joplin* is the agreement to conspire, and the Court there stated that overt acts cannot be used to show that the agreement was against federal law because "the averment of the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number * * *." *Joplin* at 535-36. In other words, an overt act alleging that one did an illegal thing does not allege that all conspired to do so, and therefore it cannot be relied upon as a charge.

The instant indictment is rather different, for the conspiracy count adequately charges conspiracy, and it is not necessary to refer to overt acts to find an illegal agreement.

Under the statutes under which defendants are charged, only one individual need have a connection with a federally insured institution. Allegations to that effect in the overt acts supply that identification without the danger, recog-

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Reading count I of the indictment as a whole, we hold that its allegations of control of management and operation, together with the factual allegations of overt acts, naming or at least intimating each of the defendants to have an official position with some of the financial institutions involved, satisfy the requirement that at least one of the conspirators be "connected in any capacity" with the institutions named in the count.

The defendants also challenge the sufficiency of the substantive counts of the indictment. Citing *United States* v. *Quinn*, 7 Cir., 365 F. 2d 256 (1966); *United States* v. *Britton*, 107 U. S. 655 (1882); and *United States* v. *Northway*, 120 U. S. 327 (1887), they urge that the misapplication counts of the indictment fail to allege the essential elements of conversion. Since the indictment was tested by motions for bills of particulars, which were denied, the alleged defect in the indictment has not been cured by failure to act on defendants' part.

In *Britton, supra* at 666-67, the Supreme Court stated:

> "We think the willful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offence of willful misapplication, there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged. This essential element of the offence is not averred in the counts under consideration * * *."

In *Quinn, supra* at 260, this court, merely repeating the language of the Supreme Court in *Britton* at 669, interpreted *Britton* to hold only that the averment "wilfully

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nized in *Joplin*, that all defendants will be deemed to have conspired to do what was alleged in an overt act because one did so.

misapplied'' was not sufficient in an indictment, but that there must be further averments that the willful misapplication was made and that it was unlawful. In *Quinn*, the requirement of a further averment beyond that of willful misapplication was satisfied by the averment that the defendant converted the moneys in question to his own personal use.

Contrary to defendants' contention, *Quinn* does not require the incantation of an allegation of conversion in an indictment under § 657 or § 1006, 18 U. S. C. A. in order for the indictment to withstand a test of its sufficiency. As stated, the only requirement recognized by *Quinn* is an averment showing an unlawful application which, if proved, would amount to a conversion. Such an averment is necessary in order to avoid charging and convicting an individual for no more than maladministration, mistake, or ineptitude. *Cf. Britton, supra* at 667-668. Where it is clear that the allegedly defective count of the indictment cannot be read to charge mere maladministration, then the count is sufficient. *Cf. Britton, id.*

As applied to the instant case, therefore, the sufficiency of the counts of the indictment is to be tested, not by whether they literally allege conversion, but whether they allege unlawful application with the intent to defraud the association, to the use of some party other than the association.

Having carefully examined the counts of the indictment, we find that a number of them sufficiently charge an unlawful application to withstand the attack upon the sufficiency of the indictment. *Cf. Ramirez* v. *United States*, 9 Cir., 318 F. 2d 155 (1963).

Count III of the indictment charges Kahn, as vice-president and member of the Board of Directors of Chatham Bank of Chicago, and Sachs, as attorney of the

Chatham Bank, with having fraudulently caused the disbursal of Chatham's check in the amount of $225,000, payable to Midwest Bank and Trust Company, which sum was represented to be the proceeds of a loan made to Sandy Building Corporation, secured by a mortgage on certain identified property, "well knowing that said property failed to provide sufficient security for the loan in that said property had fair market value substantially less than the disbursement * * *." The unlawful application of bank funds charged in this count is the knowing and purposive disbursal, without adequate security, of bank funds to a third party. The additional allegation in the count that such disbursal was made with the intent to defraud indicates that the disbursal, made knowing the inadequacy of the security, was not an act of maladministration, but one of criminal misapplication.

Count IV of the indictment similarly charges Kahn and Sachs with fraudulently causing the disbursal of a Chatham check in the amount of $155,000, payable to Edward Ferrari, purportedly representing proceeds of a Chatham loan in that amount which Kahn and Sachs fraudulently caused to be granted to Ferrari, "well knowing that the proceeds of said loan would be used for the personal benefit and advantage of said defendants and further well knowing that said loan was granted on the basis of a false and fraudulent letter of commitment" from a certain savings and loan association, and knowing the letter of commitment was executed without authority.

Defendants attack the sufficiency of this count, notwithstanding its charge of conversion, on the ground that it only speculates concerning a use in the future. This ground of attack is mistaken. Willful misapplication is the crime charged. As we have said, a conversion need not be alleged as long as an unlawful application is shown by allegations. This was adequately done. Furthermore, the allegation of

illegal disbursal to Ferrari, a third party, with knowledge that the proceeds of the loan would be used for their personal benefit in effect alleges a present conversion to a third party or to an agent of Kahn and Sachs.

The charges of count VII are adequate for the same reasons. Counts VIII and X, which were dismissed as to Kahn, also sufficiently charge a crime by Sachs.

Count XVI of the indictment charges Sachs and Curran with the misapplication of moneys belonging to and entrusted to the care and custody of Equitable Savings and Loan Association, of which Curran was a director and Sachs, attorney, in a fashion similar to the other counts. The count charges the illegal transfer of $625,070.27 to a certain named institution, which amount allegedly represented partial proceeds from a loan Sachs and Curran fraudulently caused to be made by Equitable, based upon inadequate security and a false appraisal report. Once again, the allegation of unlawful application is satisfied by showing a transfer to a third party, without adequate security and through means of false information, of funds of a federally insured savings and loan association.

From the foregoing considerations, we conclude that those counts of the indictment about which there is a contest on appeal adequately charge crimes, and we hold that the indictment was sufficient.

Credibility Instruction.

During the trial, the trial judge made an *in camera* inspection of FBI reports, which were based on FBI interviews with Sachs and Curran and which were not admitted into evidence at trial. Sachs and Curran contend that the trial judge's reading of the inadmissible

material[4] and his resultant belief that there was a discrepancy between the defendants' testimony at trial and the information given in the FBI reports caused him to give a prejudicial credibility instruction.

At the conference on instructions, the Government tendered a "La Buy" credibility instruction, which defendants accepted without objection. This instruction reads:

> "In weighing the testimony of each witness the jury should consider his relatioinship to the Government, or to the defendant; the witness's interest, if any, in the outcome of the case; his manner of testifying; his candor, fairness and intelligence; and the extent to which he has been corroborated or contradicted, if at all, by other credible evidence.
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> "A defendant who wishes to testify is a competent witness, and his testimony should not be disbelieved merely because he is the defendant. However, in weighing his testimony, the jury should consider the fact that a defendant has a vital interest in the outcome of this trial."

The trial judge in his charge to the jury, however, without notice to the Government or defendants, gave a much longer instruction relating to credibility.[5]

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4. The FBI reports were made inadmissible by stipulation. The trial court was forced to consider the reports carefully upon repeated Government motions that it be allowed to use them for impeachment purposes. All the Government's motions were denied.

5. The instructions relating to credibility given by the trial court in large part closely parallel those given by Judge Medina in *United States* v. *Foster*, 9 F. R. D. 367, 388-389. While appeals were taken and the case was ultimately affirmed, *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201 (1950), 341 U. S. 494 (1950), the instructions themselves were not passed upon.

The instructions relating to credibility given by the trial court read as follows:

> "Now I come down to the general question, which is a problem in any criminal case of this type, and that

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Defendants urge that this longer instruction was given because the trial judge's reading of the FBI reports caused him to perceive discrepancies in testimony, to be suspicious of defendants' testimony, and therefore to overstress prejudicially the jury's duty to consider a witness's bias and interest in the outcome of the trial. It is contended, in effect, that by his insistent emphasis on credibility, the trial judge conveyed to the jury what almost amounted to a direction that the testimony of Sachs and Curran required more than ordinary scrutiny and that it could be rejected entirely.

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deals with the question of the credibility of the witnesses who have testified because in the final analysis in this case, when you arrive at your verdict, it will be on the basis of the testimony that you heard here on the part of witnesses who took the witness stand, plus the documentary evidence that has been introduced.

"Now, I don't think that I have to remind you that this particular case bristles with issues of veracity. I think that in instances too numerous to specify the testimony of the witnesses called by the Government has been flatly contradicted by the testimony of the defendants.

"I call your attention only to one part of the testimony and I call your attention to that because it has been referred to in the closing arguments of counsel, and it is also more recent than some of the other testimony that you may have heard, the testimony that you heard here.

"You will recall that there was some testimony furnished by the two defendants to the effect that before the $800,000 loan was disbursed, a loan committee meeting had been called in the office of Mr. Sachs and in which the two defendants testified that certain parties were present and they discussed the making of an $800,000 loan.

"Other witnesses in this case took the witness stand —and I am referring to Mr. Regas, the witness Regas; the witness Wolfson, and, I believe, Mr. Lampros, but you will recall what the evidence was, in which they denied that any such meeting took place for the pur-

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Length alone is not a controlling factor in assessing prejudice. *Cf. United States* v. *Birnbaum*, 2 Cir., 373 F. 2d 250, 257 (1967). Nonetheless, there are two questions which must be answered with respect to the credibility instruction given. The first determination to be made is whether it can be fairly said that the instruction singles out or unmistakably refers or draws attention to Sachs and Curran, or whether it was applicable to all witnesses who testified. It must then be determined whether the extended emphasis on credibility prejudiced them.

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pose of discussing the $800,000 loan in a loan committee meeting.

"Now, you as the jury—I am making no comment on this evidence, I am simply calling this evidence to your attention for the purpose of demonstrating what I mean when I am discussing the question of the credibility of witnesses.

"You will have to decide and you will have to make the choice as to which witnesses were speaking the truth. It is your function and your function alone to decide where the truth lies in this case.

"Now you may be asking yourself by what yardstick and in accordance with what rules of law you as the jury are to judge the credibility of the witnesses, including that of the two defendants who offered themselves as witnesses.

"Now, I suppose that every witness who takes the witness stand here and raises his hand is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witnesses testify, by the character of the testimony that he gives or by contradictory evidence.

"You should carefully scrutinize the testimony given, the circumstances under which each witness has testified in this case and every matter in evidence which tends to indicate whether the witness is worthy of belief.

"Now, you should consider each witness's intelligence, his motive, if you think there was some motive;

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After examination of the challenged instruction, we cannot say that the jury was alerted that the credibility of Sachs and Curran, as distinguished from that of other witnesses, was to be given special examination. The instruction is directed to the credibility of all witnesses, is qualified to insure that it has application to all witnesses, and properly notes what can be taken into account in assessing credibility.

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state of mind, his demeanor and manner while on the stand.

"You should also consider any relation each witness may bear to either side of the case. You should consider the manner in which the witness may be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

"Now, inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony.

"Two or more persons witnessing an incident or a transaction may see it or hear it differently and innocent misrecollection, like failure of recollection, particularly as to times, dates, and places, is not an uncommon experience.

"In weighing the effect of a discrepancy I want you to consider whether it pertains to a matter of importance or to an unimportant detail and whether the discrepancy results from innocent error or wilful falsehood.

"Now, if you find that the presumption of truthfulness is to be outweighed as to any witness, then you will give the testimony of that witness such credibility, if any, as you think that it deserves.

"Now, in other words, there is nothing different in the way that a jury is to determine the credibility of a witness from that in which all reasonable persons size up other people with whom they are dealing when they make important decisions.

"Now, as to that, you consider whether the person with whom you are dealing had the capacity and the opportunity to observe and be familiar and remember the things that he tells about. You consider any pos-

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Other than what is claimed to be unwarranted emphasis, defendants do not argue that the instruction incorrectly states the law relating to credibility. It may indeed be that the FBI reports prompted the trial judge to give this instruction. However, to suggest that the origin of or motive for the unusually long instruction taints its substance is to assume that it is nothing more than its sources. Notwithstanding the possible origination of the instruction, we look to and judge only its legal substance.

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sible interest that he may have, any bias or prejudice. You decide whether the witness strikes you as being fair and candid; in other words, you size him up and then you consider the inherent believability of what he says and whether it accords with your own knowledge or experience. The same thing is true with witnesses; you ask yourself if they know what they are talking about. You watch them on the stand. You decide how their testimony strikes you.

"Take the matter of interest, for example. You may feel that some of the witnesses, whether for the Government or for the defense, have an interest in the outcome of this case. Where a witness has a strong personal interest in the outcome of a trial, the temptation may be strong to color, pervert or withhold the facts, or even though completely honest, a witness who has an interest in the case may unconsciously shade his testimony.

"On the other hand, such a witness may be telling the exact truth despite his interest in the outcome. You must consider all of the attendant circumstances in determining whether and to what extent interest has affected a witness.

"What I have said concerning the interest of the witness applies with equal force to the matter of bias and prejudice; where you find that any witness has any bias or prejudice for or against any of the parties, you will consider whether and to what extent such bias or prejudice may have affected his testimony.

"You will, accordingly, observe that before reaching any conclusions as to whether or not you will believe the testimony of any particular witness or as to whether you will believe part of the testimony of a

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While long, we find that the instruction was carefully balanced and that while it dealt at length with credibility, it in no way indicated who or what was credible or incredible. What appears to emphasize when taken out of context is, in fact, unstressed in context. Reading the instruction on credibility with the other instructions, and taking the charge to the jury as a whole, we hold that there was no prejudicial emphasis upon defendants' credibility.

Instruction on Lying Witnesses.

Sachs and Curran also contend that the trial court gave an erroneous instruction concerning lying witnesses. A standard instruction in this area is the "La Buy" *falsus in uno, falsus in omnibus* instruction which reads:

> "If the jury believes that a witness has wilfully sworn falsely to a material fact in the case, the jury may disregard his testimony in whole or in part, except insofar as it may have been corroborated by other credible evidence." La Buy Manual on Jury Instructions in Federal Criminal Cases, 33 F. R. D. 523, 574.

Relying on the fact that the Government had tendered this instruction, and believing that it would be given, counsel for Sachs and Curran, in closing argument, asked

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particular witness and reject the rest, it is essential that you give consideration to all of the circumstances bearing on the question of the credibility of a witness, as I have just indicated.

"If you believe that any witness in this case testified falsely as to a material fact, then you may disregard that testimony, except insofar as it may be corroborated by other credible evidence in the case; in other words, what I want you to do is to take all of the evidence in the case, all of the testimony given from the witness stand, all of the exhibits that have been introduced and then go back to the jury room and say by your verdict whether these defendants are guilty of the charges made in this indictment or are innocent of the charges made in this indictment."

the jury to disbelieve totally the testimony of one witness, if they found that the witness testified falsely.

The trial court, however, gave an instruction, the second paragraph quoted below, to which the defendants object:

> "You will, accordingly, observe that before reaching any conclusions as to *whether or not you will believe the testimony of any particular witness or as to whether you will believe part of the testimony of a particular witness and reject the rest,* it is essential that you give consideration to all of the circumstances bearing on the question of the credibility of a witness, as I have just indicated.
>
> "If you believe that any witness in this case testified falsely as to a material fact, then you may disregard that testimony, except insofar as it may be corroborated by other credible evidence in the case; in other words, what I want you to do is to take all of the evidence in the case, all of the testimony given from the witness stand, all of the exhibits that have been introduced and then go back to the jury room and say by your verdict whether these defendants are guilty of the charges made in this indictment or are innocent of the charges made in this indictment." (Emphasis added.)

The words of the "La Buy" instruction defendants find critical in comparison with the given instruction are "the jury may disregard his testimony in whole or in part * * *." In comparing this language with the contested instruction, defendants claim that the latter directs the jury to disbelieve only the specific testimony deemed false, and that it does not tell the jury it could disregard the whole of that witness's testimony as well.

That defendants' construction is strained is revealed by their argument that the given instruction tells the jury it may believe what it thinks false if the false testimony is corroborated. It is more natural, and therefore preferable, to read the given instruction to say that the testimony of a

witness disbelieved with respect to a material fact may be disregarded in whole, except as corroborated.

With due respect to the ideal statement of the "La Buy" instruction, the instruction given, together with the paragraph preceding it, in the language we have shown emphasized, conveys the same meaning: *falsus in uno falsus in omnibus*. We hold there was no error in the giving of this instruction.

Failure to Declare a Mistrial.

Thomas Joyce was indicted and stood for trial along with Kahn, Sachs and Curran. On the second day of the trial, before witnesses were put on, he pleaded guilty, out of the presence of the jury, to aiding and abetting Sachs and Kahn in misapplying funds of the Chatham Bank, the fourth count in the indictment in which they were named as principals. Following Joyce's plea, the defendants moved for a mistrial on the ground that Joyce's plea could not be explained to the jury without prejudicing the defendants. The further argument was made that one cannot be guilty of aiding and abetting unless a principal is found guilty of the same crime. Finally, it was argued that, with respect to the remaining counts of the indictment, some of which also included aiding and abetting charges against some of the defendants, it would be necessary for the court to tell the jury in its charge that the guilt of an aider-abettor is dependent upon that of the principal.

The trial judge denied the motions, and when the jury was returned, he instructed it that Joyce had pleaded guilty to count IV of the indictment, that Kahn and Sachs remained as defendants in count IV and that the trial would proceed against them. He then went on to instruct the jury at that time that Joyce's plea was not evidence of the guilt of the other defendants charged in the count and that the guilt or innocence of the other defendants was to be de-

termined solely on the evidence introduced in the trial. The court gave a similar instruction in its charge to the jury at the conclusion of the trial.

On appeal, the same grounds are urged in favor of the proposition that a new trial should be granted. Additionally, it is asserted that the trial court abused its discretion in failing to declare a mistrial at such an early stage.

We cannot clearly know how certain disclosures or incidents at trial may affect the collective mind of the jury. The argument that a specific occurrence was prejudicial is always an argument that under the facts of the particular case the jury was probably so impressed with the occurrence that it could no longer perform its functions clear-mindedly and fairly. The rationale of cautionary or curative instructions, on the other hand, is that the impression of the occurrence has not been so great that the jury cannot, as it were, bracket the occurrence, and disregard it.

The defendants have equated Joyce's guilty plea with a confession or statement admitted against a co-defendant, such as is found in *Barton* v. *United States,* 5 Cir., 263 F. 2d 894 (1959); *Schaffer* v. *United States,* 5 Cir., 221 F. 2d 17 (1955); and *United States* v. *Haupt,* 7 Cir., 136 F. 2d 661 (1943). Extensive descriptive statements were involved in the foregoing cases, and it was determined that statements of a defendant which were admitted into evidence and which were incriminating as to other defendants were so prejudicial as to have required separate trials.

While a plea of guilty is a confession of guilt, it lacks the impress, before substantial evidence has accumulated at trial, of a confession or statement in which the hard features of connected facts form a silhouette of verity. Notwithstanding the contervailing efficiency of granting a motion for a mistrial at an early stage of trial, a guilty plea entered then is not the equivalent of a descriptive confession of criminal deeds.

While we have distinguished between an extended confession of guilt and a plea of guilty, we must yet consider the effect of an aider-abettor's guilty plea upon his principal.

To say that an aider and abettor cannot be found guilty unless the principal is found guilty is different from saying that one so charged may plead guilty without a like plea by the principal. In the latter case, the guilty plea does not carry with it a finding that the principal is first guilty. It is not a necessary conclusion, therefore, that a jury instructed as to the dependency of its verdict as between principal and aider-abettor would adjudge a principal guilty on the plea of an aider, particularly where there has yet been no evidence, where there are curative or cautionary instructions, and where there are final, comprehensive instructions regarding proof, testimony, and weighing of the evidence.

A number of courts have determined that a co-conspirator's or co-defendant's entry of a guilty plea, even on occasion before the jury, was not prejudicial, in view of a cautionary instruction. *E.g., Koolish* v. *United States,* 8 Cir., 340 F. 2d 513 (1965), cert. den., 381 U. S. 951 (1965); *Casados* v. *United States,* 5 Cir., 300 F. 2d 845 (1962), cert. den., 373 U. S. 938 (1963); *Davenport* v. *United States,* 9 Cir., 260 F. 2d 591 (1958), cert. den., 359 U. S. 909 (1959); *Nemec* v. *United States,* 9 Cir., 178 F. 2d 656 (1949), cert. den., 339 U. S. 985 (1950).

Whatever the rule should be regarding a confession of a co-conspirator, *cf.* Orfield, Criminal Procedure Under the Federal Rules, § 14.94, we are not persuaded that a jury cannot follow an admonition as to a plea of guilty where no evidence is elicited and where the meaning of the plea for other defendants is not emphasized. Absent aggravating circumstances, such as an incurable direct, stated, or necessary implication of the guilt of other de-

fendants by the pleader, or the failure of the trial judge to give the jury cautionary instructions, we hold that the acceptance of a guilty plea by an aider-abettor without declaration of a mistrial is not error. Without a convincing demonstration otherwise, it is to be presumed that clear and strong cautionary instructions are curative.

Severance.

Defendants Sachs and Curran contend that the trial court committed prejudicial error in failing to grant them a severance from Kahn. Their contention is threefold. They claim that by being tried with Kahn, they were deprived of the right to comment in their argument to the jury upon Kahn's failure to take the stand. In the same manner, they contend they were precluded from exercising their Sixth Amendment right to call Kahn to the witness stand. Finally, they argue that the failure to sever resulted in the introduction of substantial complex testimony and documentary evidence that would have been inadmissible against them in a separate trial.

For his part, Kahn contends that there was an improper joinder of defendants, arguing in effect that because of the conspiracy count, he was subjected to the evils attendant upon conspiracy trials—the admission of evidence and proof of conspiracy by evidence admissible only upon the assumption that conspiracy existed. In other words, Kahn's argument appears to be the same as the final contention of Sachs and Curran that had there been separate trials, certain evidence that was admitted in the joint trial could not have been admitted against Kahn.

Severance of offenses and defendants is discretionary with the trial court. Rule 14, Federal Rules of Criminal Procedure, 18 U. S. C. A.; *Opper* v. *United States*, 348 U. S. 84, 95 (1954); *United States* v. *Echeles*, 7 Cir., 352 F. 2d

892 (1965), and the cases cited there. Of course, such discretion is subject to correction if abused. *Echeles, supra.*

Generally, where the indictment charges a conspiracy, or a crime having a principal and aider-abettors, the rule is that persons jointly indicted should be tried together. *United States* v. *Lebron,* 2 Cir., 222 F. 2d 531, 535 (1955), cert. den., 350 U. S. 876 (1955). And where proof of the charges against the defendants is dependent upon the same evidence and alleged acts, as is the case when the charged relationship of the defendants is principal-aider-abettor, severance should not be granted except for the most cogent reasons. *United States* v. *Smith.* D. C. Ill., 209 F. Supp. 907, 914 (1962). *Cf. United States* v. *Kahaner,* D. C. N. Y., 203 F. Supp. 78 (1962); *United States* v. *Bentvena,* D. C., N. Y., 193 F. Supp. 485 (1960), aff'd, 2 Cir., 357 F. 2d 58 (1966), cert. den., 385 U. S. 815 (1966). Not to be forgotten among the considerations affecting the exercise of the trial court's discretion is the possible prejudice to the Government which might result from a separate trial, *Smith, supra.*

We are aware of and concerned with the problems in protecting the rights of individuals in conspiracy trials. Procedural and evidentiary advantages given the prosecution and the substantial difficulties raised for defendants attempting to distinguish themselves and their acts as innocent in a confusing crowd of suspicious figures and activities were noted by Justice Jackson in his classic concurring opinion in *Krulewitch* v. *United States,* 336 U. S. 440, 445 (1949).

Acts and declarations of conspirators in furtherance of a conspiracy are admissible against alleged co-conspirators. Ordinarily, some evidence of a conspiracy should be furnished before the statements of alleged co-conspirators are admitted against each other. This practice, however, is relaxed by the discretion of the trial

court. Statements and testimony as to acts are received in evidence, with an objection shown, and the jury is given the mass of evidence, undifferentiated except as the order of proof, objections of counsel, and instructions of the judge distinguish it. The jury is instructed, as it was a number of times in this case, both during the trial and at the charge, that if it finds beyond a reasonable doubt that a conspiracy existed, then the acts and statements of those whom it finds conspirators are admissible against the co-conspirators. But the jury is also instructed that in determining whether any particular defendant was a member of the conspiracy, it should consider only his own acts and statements, as a defendant cannot be bound by the acts or statements of members of the conspiracy until the jury finds that a conspiracy existed and that he was a member of it.

It can be readily seen, therefore, that a conspiracy trial creates real and serious possibilities of confusion in the jury, which may indulge in unwarranted imputations of guilt, particularly where the evidence is complex or circumstantial and where there are many defendants.

These are the risks of a conspiracy trial before a jury, risks tempered by the assumption of the jury system that jurors understand and follow instructions on the law. As always, however, the theoretical issue must be examined in the glare of fact. The question which must be asked in the particular case is whether the possibilities of danger to a fair trial have become realities of prejudice in the jury.

Thus, with respect to a severance in a trial of co-conspirators or co-defendants, it is necessary to determine whether a joint trial infringes a defendant's right to a fundamentally fair trial. *Echeles, supra.* This determination is made by asking whether it is within the jury's capacity, given the complexity of the case, to follow admonitory

instructions and to keep separate, collate and appraise the evidence relevant only to each defendant. *Gorin* v. *United States,* 1 Cir., 313 F. 2d 641, 646 (1963) cert. den., 374 U. S. 829 (1963); *Smith, supra; Kahaner, supra.*

In view of the complete admonitory instructions given by the trial court, to find an abuse of discretion in the trial court's failure to grant a severance of defendants in a trial on an indictment charging conspiracy and joining defendants in the relation of principal-aider-abettor, on grounds relating to the complexity and admissibility of evidence, the defendants must make a strong showing of prejudice. We have examined the cited record for the suggested confusing and prejudicial knot of evidence and have not found it. Not having found nor having been shown the clear likelihood of confusion in the jurors' minds so great as to prejudice the defendants, we hold the trial court did not abuse its discretion in refusing to grant a severance.

Sachs and Curran, relying on *De Luna* v. *United States,* 5 Cir., 308 F. 2d 140 (1962), reh. den., 324 F. 2d 375 (1963), claim prejudice from their joint trial with Kahn because of their inability to comment on Kahn's failure to take the stand.

De Luna was a narcotics case in which the two co-defendants had contradictory defenses. De Luna and Gomez were the occupants of a car from which police observed narcotics thrown. Gomez testified that he was innocent and that his only connection with the narcotics occurred when de Luna, seeing police coming, tossed him a package, the contents of which were unknown to Gomez, and told him to throw it out the window, which he did. De Luna did not testify, and his attorney argued that Gomez was the sole culprit. Gomez was found not guilty; de Luna guilty. On the question of whether the Fifth Amendment protected de Luna from prejudicial comments

on his silence, the court held that he had a constitutionally guaranteed right to silence and that his co-defendant's attorney could not comment on his silence.

In the course of its opinion, the court offered the following dicta, upon which defendants rely:

> "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.
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> * * *
>
> "* * *. And considering the case from Gomez's point of view, his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Gomez has rights as well as de Luna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from de Luna's absence from the stand." *De Luna* at 141, 143.

Circuit Judge Bell, in his special concurrence in *De Luna,* expressed his disagreement with the majority with respect to the scope of the right of Gomez:

> "There is no authority whatever for the proposition that Gomez would in any wise have been deprived of a fair trial if the comments regarding the failure of de Luna to testify had not been made. He had no right to go that far. He did have the right to testify against de Luna as he did. * * *.
>
> * * *
>
> "* * *. If Gomez, or others similarly situated, claims the right which the majority holds that he has to comment on the failure of de Luna to testify, a mistrial will be required at the instance of his co-defendant who did not take the stand. In addition,

> severance in advance of trial may be required where there is a representation to the court that one co-defendant does not expect to take the stand while another or others do expect to testify, and claim their right to comment upon the failure of the other to testify. This would eliminate joint trials, or vest in a defendant the right to a mistrial during final arguments, or in the alternative create built-in reversible error, all in the discretion of the defendants." *De Luna* at 155-56.

The remarks of Judge Bell clearly reveal the difficulties involved in holding that defendants have a right to comment upon the silence of their co-defendants. The question as we see it is how essential is it to a fair and complete defense, an attribute of a fair trial, that defendants be permitted to comment upon a co-defendant's exercise of his right against self-incrimination.

The procedural difficulties and the complication of joint trials arising from the rule suggested by dicta in *De Luna* are so great that we cannot say there is an absolute right, without reference to the circumstances of defense at trial, for a defendant to comment on the refusal of a co-defendant to testify. We think there must be more to justify the disintegration of a trial, such as a conspiracy trial, in which there is a cohesion of crime alleged, defendants charged, and proof adduced. There must be a showing that real prejudice will result from the defendant's inability to comment. *Hayes* v. *United States,* 8 Cir., 329 F. 2d 209, 221 (1964); cert. den., 377 U. S. 980 (1964).

There was an effort in the defense to get the jury to divorce its consideration of the guilt of Sachs and Curran from that of Kahn on the various charges, and correlative to this, there was an attempt to portray Sachs and Curran as innocent and rather naive agents of a dexterous mastermind, Kahn, and his principal accomplices. An element of Kahn's defense, somewhat inconsistent with that of

Sachs and Curran, was that Kahn, in his activities, acted, apparently in good faith, with the advice and in conjunction with responsible and reputable individuals.

Thus, it must be concluded from the record that the defense of Sachs and Curran was inconsistent with that of Kahn. The degree of antagonism, however, is not as great as that in *De Luna* where the defenses were mutually exclusive. There, if one defense were believed, the other could not be. In the instant case, it is not clear that Kahn could not have been found innocent if Sachs and Curran were so found.

It must be noted that there were many witnesses and that a great amount of evidence was brought before the jury. However, the extensive evidence and testimony did not present the jury the dilemma of mutually exclusive defenses, with no evidentiary basis for judgment between them, in which a comment on the failure to testify would indicate which horn of the dilemma should be seized. While we dislike the necessity of weighing the benefit which might accrue to a defendant by his counsel's comment on a co-defendant's refusal to testify, we are not convinced that Sachs and Curran suffered any prejudice from their inability to do so. We hold that the trial court did not err in refusing to sever for the ground asserted.

Finally, with respect to severance, Sachs and Curran, relying on *United States* v. *Echeles, supra,* claim that the joint trial with Kahn prejudiced them by precluding them from exercising their right to call Kahn to the witness stand.

In *Echeles,* attorney Echeles was tried jointly with his former client, Arrington, for subornation of perjury. Echeles moved for severance, which was denied, on the ground, *inter alia,* that he would be unable to call Arrington to the stand for the purpose of eliciting testimony

exculpatory of Echeles. On appeal, this court, aware of the fact that there was record testimony of Arrington from prior proceedings which was exculpatory of Echeles stated:

> "* * * we hold merely that, having knowledge of Arrington's record testimony protesting Echeles' innocence, and considering the obvious importance of such testimony to Echeles, it was error to deny the motion for a separate trial." *Echeles* at 898.

As with the right to comment on the silence of a co-defendant, there is no absolute requirement for a severance when defendants suggest that the testimony of a co-defendant is not available to them unless they are tried separately. The unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous. *United States* v. *Kahn*, 2 Cir., 366 F. 2d 259, 263-64 (1966), cert. den., 385 U. S. 948 (1966); *Olmstead* v. *United States*, 9 Cir., 19 F. 2d 842, 847-48 (1927), aff'd, 277 U. S. 438 (1928).

Kahn's Further Contentions.

In addition to those of the above contentions which he joins, Kahn urges that there was an improper joinder of defendants, that the court erred in not giving a certain instruction relating to Kahn's theory of defense, and that irrelevant and immaterial evidence was admitted.

Kahn contends that there was an improper joinder of the conspiracy count and the substantive counts of the indictment, claiming that the joinder reflects a prosecutorial attempt to overwhelm the defendants with prejudicial evidence in a situation in which the trial court cannot adequately protect them.

The question of a severance of counts, as Kahn recognizes, is addressed to the discretion of the trial court, the exercise of which is corrigible only for abuse. To find an

abuse of discretion it would be necessary, in effect, to find that the facts and law presented to the trial judge at the time of the motion for severance demonstrated that a trial under joinder was likely to be unfair and that the trial was in fact unfair. Of course, the latter finding would go far in supporting the former.

The conspiracy count in the indictment in the present case essentially charges a conspiracy to commit the crimes charged in the substantive counts. Thus, there is no disparity of charges tending to complicate or confuse the proof or defendants. In a trial under this kind of indictment, the possible threats to a fair trial arise from the joinder of defendants, and not of counts. The joinder of defendants, as we have held, was not improper.

With respect to the trial court's refusal to instruct the jury to acquit Kahn if it believed he was acting according to the advice of his counsel, the law requires, before an instruction relating to a theory of defense is given, that the record contain evidentiary support for the theory. *Perkins* v. *United States*, 9 Cir., 315 F. 2d 120, 124 (1963), cert. den., 375 U. S. 916 (1963). That evidentiary support is lacking in this case. Furthermore, there must be a showing that the defendant made full disclosure to his attorneys of all the facts pertaining to the transactions under scrutiny. *United States* v. *Hickey*, 7 Cir., 360 F. 2d 127, 142 (1966), cert. den., 385 U. S. 928 (1966). There is no contention on appeal that Kahn could not put on such proof because his attorneys were his co-defendants.

Kahn's final contention is that the trial court admitted immaterial and irrelevant evidence relating to transactions falling outside the indictment. The Government rejoins, however, that the evidence was both material and relevant.

We have examined the cited evidence, which relates to the repayment by certain companies controlled by Kahn

of loans made them by a bank with which Kahn and Sachs were involved. Since the evidence relates to the disposition of loan funds, which defendants were charged with misapplying, we do not find it irrelevant to the inquiry into misapplication. Furthermore, we agree with the Government that these loans are imprinted with the pattern of loan manipulation with which Kahn was charged, and that evidence relating to them was relevant to intent with respect to the counts charged. See *United States* v. *Klein*, 2 Cir., 340 F. 2d 547 (1965), cert. den., 382 U. S. 850 (1965).

Generally, the admission of evidence for such a purpose would require an instruction limiting the jury to consideration of it only with respect to intent. However, the evidence was not admitted with so limited a purpose, and no request was made that it be limited. Consequently, it must be deemed generally admitted, and as it was relevant and material, that its admission was not prejudicial.

In sum, we conclude that defendants were accorded a fair trial, and, there being no challenge to the sufficiency of the evidence to convict, the judgments appealed from are affirmed.

AFFIRMED.

APPENDIX.

COUNT I.

1. That commencing on or about July 1, 1962 and continuing to on or about the date of this indictment, in the Northern District of Illinois and other places to the Grand Jurors unknown,

S. Lawrence Kahn,
Arthur B. Sachs,
Thomas E. Joyce, and
M. Prial Curran,

defendants herein, knowingly and wilfully did conspire, combine and confederate with each other and with Edward Ferrari and Mary Jean Burleson, named as co-conspirators herein, but not as defendants, and with other persons whose names to this Grand Jury are unknown, to commit offenses and to aid, abet, counsel and procure the commission of offenses against the United States, to-wit: to unlawfully and wilfully violate Sections 656, 657, 1001, 1005 and 1006, Title 18, United States Code, more particularly:

(a) to misapply and cause to be misapplied for their own personal gain, use, benefit and advantage moneys and funds of the Chatham Bank of Chicago, the deposits of which were insured by the Federal Deposit Insurance Corporation with intent to defraud said Chatham Bank of Chicago;

(b) to misapply and cause to be misapplied for their own personal gain, use, benefit and advantage moneys and funds belonging to and entrusted to the care and custody of Leyden Savings and Loan Association, Franklin Park, Illinois; Equitable Savings and Loan Association, Chicago,

Illinois; Property Federal Savings and Loan Association, Chicago, Illinois; and George Washington Savings and Loan Association, Chicago, Illinois, the accounts of which were insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud said Savings and Loan Associations;

(c) to participate, share in and directly and indirectly receive moneys and funds of Leyden Savings and Loan Association, Equitable Savings and Loan Association, Property Federal Savings and Loan Association and George Washington Savings and Loan Association, through loans and transactions of said Association, the accounts of which were insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud said Associations;

(d) to make and cause to be made false entries in the books, reports, records and statements of Chatham Bank of Chicago, with intent to defraud said Chatham Bank of Chicago and the agents and examiners appointed to examine the affairs of said bank.

(e) to make and cause to be made false entries in the books, reports, records and statements of Leyden Savings and Loan Association, Equitable Savings and Loan Association, Property Federal Savings and Loan Association and George Washington Savings and Loan Association, with intent to defraud said Associations and the auditors, agents and examiners of the Federal Home Loan Bank Board.

2. It was a part of said conspiracy for the defendants through their control of the management and operation of the Chatham Bank of Chicago to fraudulently cause loans to be made by said Chatham Bank of Chicago in excessive amounts to various individuals and corporations controlled by said defendants or their nominees for defendants' own personal use, benefit and advantage.

3. It was a further part of said conspiracy for the defendants through their control of the management and operation of Property Federal Savings and Loan Association to fraudulently cause loans to be made in excessive amounts to various individuals and corporations controlled by said defendants or their nominees for the defendants' own personal use, benefit and advantage.

4. It was a further part of said conspiracy for the defendants to acquire control of the management and operation of Leyden Savings and Loan Association with funds partially supplied through loans defendants fraudulently caused to be made by Chatham Bank of Chicago.

5. It was a further part of said conspiracy for the defendants to secure control of the management and operation of Leyden Savings and Loan Association partially with funds derived from a loan commitment letter defendants fraudulently caused to be issued on behalf of Property Federal Savings and Loan Association.

6. It was a further part of said conspiracy for the defendants upon acquiring control of the management and operation of Leyden Savings and Loan Association to cause loans in excessive amounts to be fraudulently granted by Leyden Savings and Loan Association to various corporations controlled by the defendants or their nominees for the defendants' own personal benefit, use and advantage.

7. It was a further part of said conspiracy for the defendants to use moneys and funds obtained through loan proceeds defendants caused to be fraudulently disbursed by Leyden Savings and Loan Association to purchase control of Equitable Savings and Loan Association and George Washington Savings and Loan Association.

8. It was a further part of said conspiracy for the defendants upon acquiring control of Equitable Savings and Loan Association to cause excessive loans to be granted

to various corporations controlled by the defendants or their nominees for the defendants' own personal benefit, use and advantage.

9. It was a further part of said conspiracy for the defendants to cause fraudulent loans to be made by Property Federal Savings and Loan Association and Equitable Savings and Loan Association for the purpose of securing funds necessary to repay various outstanding loans defendants had fraudulently caused to be granted for their own personal use, benefit and advantage at Chatham Bank of Chicago and Leyden Savings and Loan Association.

10. It was a further part of said conspiracy for the defendants to conceal their control of the management and operation of Leyden Savings and Loan Association, Equitable Savings and Loan Association and George Washington Savings and Loan Association through the use of nominees whom defendants caused to be appointed officers and directors of said Associations.

11. It was a further part of said conspiracy for the defendants to fraudulently cause inflated real estate appraisal reports to be submitted to Chatham Bank of Chicago, Leyden Savings and Loan Association, Property Federal Savings and Loan Association and Equitable Savings and Loan Association to support mortgage loans defendants caused to be granted by these institutions for the defendants' own personal use, benefit and advantage, well knowing that said appraisals were not based on fair market values but were in truth and in fact based upon speculation and conjecture as to the future potential of the properties involved.

12. It was a further part of said conspiracy for the defendants through false statements and representations to Federal Home Loan Board examiners and Illinois State examiners investigating the affairs of Chatham Bank of

Chicago, Equitable Savings and Loan Association and Leyden Savings and Loan Association and Property Federal Savings and Loan Association to attempt to conceal information with respect to various loans defendants had fraudulently caused to be made by these institutions as well as the disbursement and disposition of proceeds thereof.

13. Defendants and co-conspirators at several times and places hereinafter mentioned performed and caused to be performed overt acts in pursuance of, in execution of and to effect, employ and accomplish the objects, designs and purposes of said conspiracy, including, but not limited to, the following:

OVERT ACTS.

1. On or about October 1, 1962 Edward Ferrari caused an application for a loan to be made in the name of Raymond Kuznair, in the amount of $75,000.00 at Property Federal Savings and Loan Association, Chicago, Illinois.
2. On or about October 30, 1962 defendant Arthur B. Sachs caused Articles of Incorporation of Sandy Building Corporation to be filed at the office of the Secretary of State, Springfield, Illinois;
3. On or about November 1, 1962 at Chicago, Illinois, S. Lawrence Kahn presided at a meeting of the Executive Committee of the Chatham Bank of Chicago.
4. On or about November 1, 1962 at Chicago, Illinois, S. Lawrence Kahn and Arthur B. Sachs executed an escrow agreement with the Scott-Grand Building Corporation.
5. On or about November 2, 1962 Thomas E. Joyce executed a letter of commitment as attorney for

Property Federal Savings and Loan Association addressed to Chatham Bank of Chicago.

6. On or about November 2, 1962 Arthur B. Sachs caused Chatham Bank of Chicago Cashier's Check No. 301214 in the amount of $155,000.00, payable to Edward Ferrari, to be deposited in the account of Arthur B. Sachs at the American National Bank and Trust Company of Chicago.

7. On or about November 8, 1962 M. Prial Curran, Henrietta Keating, Jerome Kritchevsky and Victor Born were appointed to the Board of Directors of Leyden Savings and Loan Association at a meeting of the Board of Directors of said Association held at Franklin Park, Illinois.

8. On or about November 15, 1962 Thomas E. Joyce had a conversation on the telephone with Victor Born.

9. On or about November 28, 1962 Arthur B. Sachs issued a check drawn on his account at the American National Bank of Chicago in the amount of $175,000.00, payable to Alan James Development Company;

10. On or about December 20, 1962 M. Prial Curran executed an escrow agreement as escrow agent for Chatham Bank of Chicago relating to the sale of permanent reserve shares of Equitable Savings and Loan Association.

11. On or about January 23, 1963 at Chicago, Illinois Edward Ferrari on behalf of ASKO Investments, Inc. executed a contract for the purchase of permanent reserve shares of George Washington Savings and Loan Association.

12. On or about January 23, 1963 Leyden Savings and Loan Association, Franklin Park, Illinois, de-

fendant S. Lawrence Kahn caused the issuance of two Leyden Savings and Loan Association's checks, to-wit: Check No. 10755, in the amount of $616,900.00, payable to Premier Investment Service, Inc., and Check No. 10754, in the amount of $375,000.00, payable to Three States Mortgage Company.

13. On or about January 25, 1963 defendants caused a loan in the amount of $400,000.00 to be made by American National Bank and Trust Company, Chicago, Illinois, to Viking Investment Corp.

14. On or about February 19, 1963 at Chicago, Illinois Rudy Weinberg was elected Secretary-Treasurer and Arthur B. Sachs appointed General Counsel of Equitable Savings and Loan Association by the Board of Directors of Equitable Savings and Loan Association.

15. On or about March 28, 1963 Rudy Weinberg had a conversation with M. Prial Curran at Chicago, Illinois.

16. On or about April 8, 1963 Arthur B. Sachs deposited Check No. 77502 of Equitable Savings and Loan Association in the amount of $41,341.88 to his account at the American National Bank of Chicago.

17. On or about June 20, 1963 defendants S. Lawrence Kahn and Arthur B. Sachs caused to be submitted to Equitable Savings and Loan Association an appraisal report of Angelo LoMonaco and Associates.

18. On or about August 2, 1963 Arthur B. Sachs wrote a letter to Federal Home Loan Bank Board, 104 South Michigan Avenue, Chicago, Illinois.

in violation of Section 371, Title 18, United States Code.

COUNT III.

The January 1964 Grand Jury further charges:

That on or about November 2, 1962, in the Northern District of Illinois, Eastern Division,

S. LAWRENCE KAHN,

Vice President and Member of the Board of Directors of Chatham Bank of Chicago, and

ARTHUR B. SACHS,

duly appointed attorney of the said Chatham Bank of Chicago, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to defraud the said Chatham Bank of Chicago, did unlawfully and wilfully misapply and cause to be misapplied moneys, funds and credits of said Chatham Bank of Chicago in the amount of $225,000.00 by fraudulently causing to be disbursed Chatham Bank of Chicago Cashier's Check No. 301222, dated November 2, 1962, in the amount of $225,000.00, payable to Midwest Bank and Trust Company, which sum purportedly represented proceeds of a loan made to Sandy Building Corporation secured by a mortgage on the property located at 10001 West Grand Avenue, Franklin Park, Illinois, well knowing that said property failed to provide sufficient security for the loan in that said property had a fair market value substantially less than the disbursement of $225,000.00 as aforesaid; in violation of Section 656, Title 18, United States Code; and

M. PRIAL CURRAN,

did wilfully and knowingly and with intent to defraud the Chatham Bank of Chicago as above described, aid, abet, counsel, induce and procure the commission of the above

and foregoing offense against the United States of America; in violation of Sections 2 and 656, Title 18, United States Code.

COUNT IV.

The January 1964 Grand Jury further charges:

That on or about November 2, 1962, in the Northern District of Illinois, Eastern Division,

S. LAWRENCE KAHN,

defendant herein, Vice President and member of the Board of Directors of Chatham Bank of Chicago, and

ARTHUR B. SACHS,

defendant herein, duly appointed counsel of the said Chatham Bank of Chicago, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to defraud said Chatham Bank of Chicago, did unlawfully and wilfully misapply and cause to be misapplied moneys, funds and credits of said Chatham Bank of Chicago in the amount of $155,000.00 by fraudulently causing to be disbursed Chatham Bank of Chicago Cashier's Check No. 301214, dated November 2, 1962, in the amount of $155,000.00, payable to Edward Ferrari, purportedly representing proceeds of a Chatham Bank of Chicago loan in the amount of $155,000.00 which defendants S. Lawrence Kahn and Arthur B. Sachs fraudulently caused to be granted to Edward Ferrari, well knowing that the proceeds of said loan would be used for the personal benefit and advantage of said defendants and further well knowing that said loan was granted on the basis of a false and fraudulent letter of commitment executed by Thomas E. Joyce purportedly on behalf of Property Federal Savings and Loan Association, dated October 31, 1962, which letter purported-

ly committed said Association to pay $155,000.00 to Edward Ferrari and Chatham Bank of Chicago from proceeds of four loans described therein, whereas in truth and in fact said defendants well knew Thomas E. Joyce executed said letter of commitment without authority and without said commitment having been approved by the Board of Directors of said Property Federal Savings and Loan Association and further, without all four loans referred to in said letter of commitment having been approved by said Property Federal Savings and Loan Association at the time of the issuance of said commitment as aforesaid; in violation of Section 656, Title 18, United States Code; and

THOMAS E. JOYCE,

did, wilfully and knowingly and with intent to defraud the Chatham Bank of Chicago as above described, aid, abet, counsel, induce and procure the commission of the above and foregoing offense against the United States of America; in violation of Sections 2 and 656, Title 18, United States Code.

COUNT VII.

The January 1964 Grand Jury further charges:

That on or about January 17, 1963, in the Northern District of Illinois, Eastern Division,

S. LAWRENCE KAHN,

defendant herein, Vice President and member of the Board of Directors of the Chatham Bank of Chicago, and

ARTHUR B. SACHS,

defendant herein, duly appointed counsel of said Chatham Bank of Chicago, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent

to defraud said Chatham Bank of Chicago, did unlawfully and wilfully misapply and cause to be misapplied moneys, funds and credits of said Chatham Bank of Chicago in the amount of $123,125.00 by fraudulently causing to be deposited in the account of Premier Investment Service, Inc. $123,125.00 representing proceeds of Chatham Bank of Chicago Loan No. 29400, which loan defendants caused to be granted by said bank on the basis of a letter of commitment dated January 15, 1963 from Leyden Savings and Loan Association to Premier Investment Service, Inc. committing said Leyden Savings and Loan Association to make a loan in the amount of $616,900.00 to Premier Investment Service, Inc., which commitment the defendants well knew to be false and fraudulent in that Premier Investment Service, Inc. possessed no legal interest in the property purportedly to be used as security for making said loan and further well knowing that said letter of commitment had been obtained without the approval or knowledge of the Board of Directors of said Leyden Savings and Loan Association; in violation of Section 656, Title 18, United States Code.

COUNT VIII. [Dismissed as to Kahn.]

The January 1964 Grand Jury further charges:

That on or about January 23, 1963, in the Northern District of Illinois, Eastern Division,

S. LAWRENCE KAHN,

connected with Leyden Savings and Loan Association, Franklin Park, Illinois, by means of and through his nominee, Victor Born, Executive Vice President of said Association, and through whom said defendant S. Lawrence Kahn exercised control over the operations of said Association, and

ARTHUR B. SACHS,

attorney for said Association, a Savings and Loan Association, the accounts for which were then insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud said Leyden Savings and Loan Association, did unlawfully and wilfully misapply and cause to be misapplied moneys, funds and credits belonging to and entrusted to the care and custody of said Leyden Savings and Loan Association in the amount of $616,900.00, by fraudulently causing to be disbursed Leyden Savings and Loan Association Check No. 10755, dated January 24, 1963, payable to the order of Premier Investment Service, Inc., which sum of $616,900.00 purportedly represented proceeds of a loan defendants fraudulently caused to be made without the knowledge and approval of the Board of Directors of said Leyden Savings and Loan Association well knowing that said Association received no legally enforceable interest in any property as security for making said disbursement; in violation of Section 657, Title 18, United States Code.

COUNT X. [Dismissed as to Kahn.]

The January 1964 Grand Jury further charges:

That on or about January 23, 1963, in the Northern District of Illinois, Eastern Division,

S. LAWRENCE KAHN,

connected with Leyden Savings and Loan Association, Franklin Park, Illinois, by means of and through his nominee, Victor Born, Executive Vice President of said Association, and through whom said defendant S. Lawrence Kahn exercised control over the operations of said Association, and

ARTHUR B. SACHS,

attorney for said Association, a Savings and Loan Association, the accounts of which were then insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud said Leyden Savings and Loan Association, did unlawfully and wilfully misapply and cause to be misapplied moneys, funds and credits belonging to and entrusted to the care and custody of said Leyden Savings and Loan Association in the amount of $375,000.00, by fraudulently causing to be disbursed Leyden Savings and Loan Association Check No. 10754, dated January 24, 1963, in the amount of $375,000.00, payable to Three States Mortgage Company, which sum of $375,000.00 purportedly represented proceeds of a loan defendants fraudulently caused to be made without the knowledge and approval of the Board of Directors of said Leyden Savings and Loan Association, well knowing that said Association received no legally enforceable interest in any property as security for making said disbursement; in violation of Section 657, Title 18, United States Code.

COUNT XVI.

The January 1964 Grand Jury further charges:

That on or about April 9, 1963, in the Northern District of Illinois, Eastern Division,

ARTHUR B. SACHS,

defendant herein, attorney for Equitable Savings and Loan Association, and

M. PRIAL CURRAN,

defendant herein, a member of the Board of Directors of said Equitable Savings and Loan Association, the accounts

of which were then insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud the said Equitable Savings and Loan Association, did misapply and cause to be misapplied moneys, funds and credits belonging to and entrusted to the care and custody of said Equitable Savings and Loan Association, in the amount of $625,070.27, on deposit at the South Shore National Bank transmitted via a wire transfer to the account of Three States Mortgage Company at the First Merchants National Bank, Michigan City, Indiana, which funds purportedly represented partial proceeds from Loan No. 12336 defendants fraudulently caused to be made by Equitable Savings and Loan Association in the amount of $800,000.00 without the knowledge and approval of the Board of Directors of said Equitable Savings and Loan Association, and well knowing that the property purportedly mortgaged to Equitable Savings and Loan Association as security for said loan had a fair market value substantially less than the amount of the loan, and that the appraisal report defendants caused to be submitted to Equitable Savings and Loan Association to support the disbursements as above described was false and fraudulent in that it was on a hypothetical plan regarding the future potential development of the mortgaged property and not on the property's then present character, to-wit: unimproved farm acreage; in violation of Section 657, Title 18, United States Code; and

S. LAWRENCE KAHN,

defendant herein, did, wilfully and knowingly and with intent to defraud the Equitable Savings and Loan Association as above described, aid, abet, counsel, induce and procure the commission of the above and foregoing offense against the United States of America; in violation of Sections 2 and 657, Title 18, United States Code.

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281-907—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 715

S. LAWRENCE KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 718

ARTHUR B. SACHS AND M. PRIAL CURRAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (K. Pet. App. 1a–28a)[1] is reported at 381 F. 2d 824.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1967. A petition for rehearing was denied

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[1] "K. Pet." refers to the petition filed by Kahn in No. 715.

on September 12, 1967 (K. Pet. App. 42a). The petition for a writ of certiorari in No. 715 was filed on October 11, 1967, and that in No. 718 on October 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to sever the co-defendants.

2. Whether the trial court's instructions on credibility were erroneous or unfair.

3. Whether the trial court properly refused petitioner Kahn's request for an instruction on the defense of good-faith reliance on legal advice, on the ground that there was no evidence to support such a defense.

4. Whether the indictment failed to allege essential elements of the offenses.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on various counts of an eighteen count indictment charging conspiracy and the illegal use of funds of a number of federally insured banks and savings associations, in violation of 18 U.S.C. 371, 656, 657, 1005, and 1006. On March 11, 1966, petitioner Sachs, who was convicted on ten counts, was sentenced to concurrent terms of imprisonment for five years on each count. Petitioner Curran was sentenced to concurrent two-year terms on four counts, and petitioner Kahn to concurrent terms of five years each on six

counts (S. App. 412–415).[2] The court of appeals affirmed.

The government's evidence was developed through numerous documents and the testimony of officers and employees of the financial institutions, and showed a chain of misuse of funds of one banking institution to acquire another. We do not canvass the evidence in detail since its sufficiency is not disputed. The pattern of petitioners' operations is exemplified, however, by the evidence relating to Counts III and IV, which shows how control of Leyden Savings and Loan Association was acquired.[3] Although Leyden was a mutual association, not subject to sale, there was an understanding that control of the association would shift with the sale of its building, worth $120,000, for $450,000 (Tr. 481–487). The purchase was financed by two loans from the Chatham Bank of Chicago, which Kahn controlled (Tr. 3080).

The first of these two loans, in the amount of $225,000, representing the bank's maximum limit, went to the Sandy Building Corporation, a company incorporated by Sachs and Curran. The loan was secured by a mortgage on property represented by Kahn to be worth over $400,000, but which an appraisal showed to be worth $257,000 (Tr. 1833–1833; 878–882). All of the details of this loan were handled by Sachs and Curran as the attorneys for all parties—Chatham,

[2] "S. App." refers to the appendix of the petitioners Sachs and Curran in the court below; "Tr." to the original transcript of trial proceedings.

[3] All of the petitioners were convicted on Count III, and Kahn and Sachs on Count IV. In addition, this acquisition was a major part of the conspiracy charge.

Kahn, and Sandy Building Corporation. The loan was not presented to the board of directors of Chatham, a fact of which Sachs was aware (Tr. 89–121, 278–285, 3069).

On the same day, Chatham granted the second loan. This loan, for $155,000, was made to one Ferrari (deceased at the time of trial), on the basis of a false letter of commitment on behalf of another association. The check was delivered to the office of Sachs, endorsed over to Sachs, and deposited in his bank account. Sachs then bought a cashier's check for $155,000. This check and the proceeds of the Sandy loan were used to purchase Leyden (Tr. 89–122, 245–278, 3077).

Curran, an associate in Sachs' law office, and employees and friends of Sachs and Kahn were elected directors of Leyden, and Sachs became its attorney (see Tr. 3079, 875–877). Improper disbursements of its funds to acquire other associations and to cover past manipulations as charged in other counts, then followed.

ARGUMENT

1. *Severance.* The petitioners in No. 718, Sachs and Curran, elected to testify at their trial, and they now argue that requiring them to be tried jointly with Kahn, who did not testify, deprived them of a Sixth Amendment right to call Kahn to the witness stand, and, in the event he refused to testify, to ask the jury to glean from such refusal an inference favorable to them.

This case, however, does not fairly present the issue raised by these two petitioners as to whether a

severance must be granted when a co-defendant "urgently needs to call to the witness stand a co-defendant" (S. Pet. 2).[4] Their involvement was not a matter peculiarly within Kahn's knowledge. Testimony as to incidents from which a knowing breach of trust could be inferred was presented by ten or more officers or employees of the institutions involved,[5] some of whom had close personal contacts with Sachs and Curran. Particularly damaging (as counsel for Sachs and Curran recognized (S. App. 333)) was the testimony of Mary Burleson, Kahn's secretary, who prepared documents and checks at Kahn's direction and who worked closely with the other petitioners (S. App. 98–222). Damaging evidence also came from such sources as an appraiser, who followed Kahn's and Sachs' instructions in inflating values (Tr. 1870–1878), and a state examiner who told of incriminating statements by Sachs (Tr. 449–458). Indeed, late in the trial, counsel for Sachs and Curran advised the court:

> Your Honor, in connection with this question of the severance, in a memorandum which we filed in which we discussed the Echles [sic] case, I indicated the possibility that we might call Mr. Kahn; I said that we would take it up in advance.

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[4] "S. Pet." refers to the petition in No. 718, filed by Sachs and Curran.

[5] There was, for example, the testimony of Mr. Jernberg, a former president of Chatham Bank (Tr. 82–145); Mr. Musich, an executive vice president of the same bank (Tr. 244 *et seq.*); Mr. Conti, the former president of Leyden Savings and Loan Association (Tr. 479 *et seq.*), etc.

> I want to say that we have decided that that will not be done so that particular question will not arise [S. App. 328].[6]

This case is not comparable to *Washington* v. *Texas*, 388 U.S. 14, on which petitioners rely. In that case there was no question of severance. This Court held that a state statute which prevented a participant in a crime from testifying for a co-participant (but not for the prosecution) unconstitutionally denied to a defendant charged with murder the right to compulsory process. There the co-participant, who had been convicted of the murder, was willing to testify (and was the only person who could have so testified) that he—not the defendant—had fired the fatal shot and that the defendant had sought to prevent him from doing so. Thus, the defendant there was denied the only source of vital and exonerating testimony—testimony which was admittedly available.

By contrast, there is not the slightest support for Sachs' and Curran's speculation (S. Pet. 9, n. 4) that Kahn might have been willing to testify in their favor if a severance had been granted. In light of the breadth of the privilege of even a mere witness to fend off inquiries that might possibly connect him with a crime, there is little likelihood that Kahn could have been compelled to testify about any of the transactions in which he, Sachs, and Curran engaged.

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[6] The case referred to is that of *United States* v. *Echeles*, 352 F. 2d 892, where the Seventh Circuit, in an explicitly limited decision, held that severance was necessary where a co-defendant had three times previously in open court, and apparently contrary to his own penal interest, voluntarily exculpated Echeles.

In *Washington*, this Court felt it necessary to caution that vindication of the right to secure the attendance of witnesses should not "be construed as disapproving testimonial privileges, such as the privilege against self-incrimination * * *." 388 U.S. at 23, n. 21.

The thrust of the allegation of prejudice resulting from the denial of the motion by Sachs and Curran to sever their trial from Kahn's is that, even if Kahn stood mute, they would have had "the valuable opportunity—specifically denied them by the trial judge below—to comment to the jury upon Kahn's unwillingness to testify * * *." (S. Pet. 9–10.) To begin with, we question whether an inference could be legitimately drawn from a co-indictee's desire to stand on his privilege. Furthermore, the circumstances of the instant case negate petitioners' contention that they have been prejudiced by their inability to comment on Kahn's failure to testify. Once again, the factual situation is critically different from that in the case on which they rely. In *DeLuna* v. *United States*, 308 F. 2d 140 (C.A. 5), there was a factual issue as to which of two occupants of an automobile had knowingly possessed the narcotics thrown from the car's window. De Luna (who was convicted) did not testify. His co-defendant (who was acquitted) did testify, and contended that De Luna alone was guilty, and his counsel commented repeatedly upon De Luna's failure to testify. All that the court held was that De Luna's privilege against self-incrimination was violated by the comments made by counsel for his co-defendant, and it accordingly reversed De Luna's conviction. The petitioners, however, seize upon the ob-

servation, clearly dictum, that if counsel's duty should require him to draw the jury's attention to the "possible inference of guilt" from a co-defendant's silence, then the judge would be obliged to order the defendants tried separately. Passing for the moment the fact that this proposition, like much dictum, was unsupported by reference to precedent or principle, it nevertheless does not advance petitioners' cause. Judge Wisdom was explicitly concerned with an inference of guilt to be drawn from silence. Even assuming such an inference might in some circumstances be tolerable where the co-indictee is being separately tried, the Fifth Circuit suggested the possibility only in a case presenting very different and far more compelling factors. There was a peculiar factual circumstance (similar to that in *Washington* v. *Texas, supra*) where only two persons had vital knowledge of the crime, and the defenses were in head-on collision, for if one witness were believed the other could not be. Thus counsel for the testifying defendant sought to suggest that sole guilt should be inferred from the refusal of the co-defendant to explain his conduct, thus exonerating the client. Here the situation is significantly distinguishable.

Sachs and Curran contended that they acted merely as attorneys for Kahn without fraudulent intent; this defense could not be aided by commenting on Kahn's failure to take the stand. The question was whether the documentary and other evidence introduced by the government, which these petitioners denied or attemped to explain away, justified an inference that

their participation in the various machinations was knowing. Kahn's silence neither added to nor detracted from the resolution of that issue, for his silence could not rationally suggest a motive to foist blame on Sachs and Curran by concealing his own guilt. Moreover, although Kahn was protected by the court's instruction that no inference could be drawn from defendant's failure to take the stand (S. App. 368), counsel for Sachs and Curran was permitted to refer to the fact that his clients had testified (S. App. 328, 330; Tr. 3787). It is apparent, then, that these two petitioners were not entitled to a severance.

Kahn's contention that the court abused its discretion by denying his requests for severance is equally without merit. He suggests no factors coloring this case that would not be applicable to any joint trial of co-conspirators, or principals and aiders and abettors. The nature of his defense—that he was innocently relying on the advice of counsel during the contrived dealings—made it especially improbable that the applicability of the evidence to specific defendants would be blurred in the minds of the jurors. His participation in the transactions was irrefutable.

2. *Instructions on credibility.* With varying emphasis and for varying reasons, both petitions attack the lengthy instructions given by the trial court (K. Pet. App. 11a–14a) on assessing the credibility of witnesses. We find no support whatever in the record for the assumption (K. Pet. 13–14) or assertion (S. Pet. 21) that the court was prompted to give the instruction because of matters coming to its attention in an *in camera* examination of pre-trial statements of

Sachs and Curran which the court refused to allow the government to use for impeachment purposes.[7] In any event, the factor that moves a trial judge to render an instruction would appear to be insignificant so long as the instruction is relevant to the issues and accurate in its import. This instruction certainly did not prejudice any of the defendants. While lengthy, it was correct and well balanced and applicable to all witnesses—government and defense alike (See K. Pet. App. 11a–14a, n. 5). It did not unduly single out the testimony of Sachs and Curran as meriting attention. Significantly, the court cautioned the jury to weigh the testimony of government witness Mary Burleson (Kahn's secretary and alleged co-conspirator) with greater care than an ordinary witness (S. App. 369). It was on her testimony that counsel for Sachs and Curran focused his attack on credibility (S. App. 334).[8]

3. *Refusal of instructions on reliance on attorney's advice.* Petitioner Kahn offered no evidence that he was acting in good-faith reliance upon the advice of counsel. In light of the absence of evidentiary founda-

[7] The court found the reports to be excluded by virtue of a pre-trial stipulation that the reports would not be used at trial.

[8] Petitioners were not improperly denied a mistrial when, on the second day of trial before any witness took the stand, their co-defendant, Joyce, entered a plea of guilty outside the presence of the jury as an aider and abettor under Count IV. The defendant Curran was not named in this count. When the court informed the jury of the bare fact of the plea, the jury was instructed that it was to determine the guilt or innocence of the other defendants without regard to the plea (Tr. 69–70), and this instruction was repeated at the close of the evidence (S. App. 355).

tion for this specific defense, the trial court did not err in refusing to render the proposed instruction that explicitly depended on the existence of such evidence (K. Pet. 14). See *Perkins* v. *United States*, 315 F. 2d 120, 124 (C.A. 9), certiorari denied, 375 U.S. 916; *United States* v. *Hickey*, 360 F. 2d 127 (C.A. 7), certiorari denied, 385 U.S. 928. In any event, the court's instructions did place the issue of good faith before the jury; the court repeatedly advised the jury that it could convict only if it found that the defendants acted with a specific purpose to violate the law, with knowledge of its prohibition, and not because of mistake, accident, etc. See *Beck* v. *United States*, 305 F. 2d 595 (C.A. 10), certiorari denied, 371 U.S. 890.

4. *Adequacy of the indictment.* There is no merit to petitioner Kahn's attack on the indictment as a pleading.

While the conspiracy count did not specify with exactitude Kahn's official positions with the federally insured institutions (as the substantive counts did), it did allege that he and the other petitioners exploited their fraudulent scheme "through their control of the management and operation" of the various institutions. (See K. Pet. App. 30a–31a). The count read as a whole, especially as detailed by the specification of some eighteen overt acts (K. Pet. App. 33a–35a), was adequate beyond peradventure to apprise petitioner of the conduct being challenged, to inform him of the contentions he would meet, and to protect him against further prosecution for the same offense. *Hagner* v. *United States*, 285 U.S. 427, 431.

Nor is there substance to the contention that various counts defectively failed to allege conversion to the petitioners' personal use. The substantive counts (see Counts III, IV, VII, charging misapplication under 18 U.S.C. 656, K. Pet. App. 35a–38a), alleged that Kahn and the other petitioners, as officers of federally insured institutions, wilfully misapplied funds by fraudulently disbursing specified amounts "well knowing," *inter alia,* that property pledged as security for the loan was grossly over-valued; that the loan would be used for the personal benefit and advantage of the petitioners; and that the loan was granted on the basis of a fraudulent letter of commitment. Compare *Ramirez* v. *United States,* 318 F. 2d 155 (C.A. 9). The court below properly held that these counts thus sufficiently alleged criminal conduct, not mere maladministration, and met the test of *United States* v. *Britton,* 107 U.S. 655, and its own decision in *United States* v. *Quinn,* 365 F. 2d 256 (C.A. 7).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ARTHUR B. SACHS AND M. PRIAL CURRAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

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No. 718.

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OCTOBER TERM, 1967.

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UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

MAY IT PLEASE THE COURT:

We submit that the government's brief highlights, rather than refutes, the importance and necessity of hearing Sachs' and Curran's petition on the merits. Significantly, the government does not dispute several of the key grounds and reasons for granting the writ:

First: The government does not dispute that the case involves a direct clash between Fifth and Sixth Amendment rights; the government instead asks the Court to accept the unsupported and wholly speculative assumption that preferring Kahn's Fifth Amendment rights over Sachs' and Curran's rights under the

Sixth Amendment probably did not result in prejudice[1] (see pp. 3-5, *infra*).

Second: The government does not dispute that the severance problem of this case is a recurring source of confusion and conflict among both federal and state courts throughout the country, as documented in our Petition (pp. 14-16). Indeed, the government is silent concerning the cases (other than *de Luna*) that demonstrate the widespread disagreement and differing criteria over severance. *E.g.*, *People* v. *Hannon*, 50 Misc. 2d 297, 270 N. Y. S. 2d 327 (1966); *People* v. *Massie*, 59 Cal. Rptr. 733, 428 P. 2d 869, 879-86, esp. p. 886 n. 31 (1967); and see the additional cases and authorities cited at pp. 14-16 of our Petition.

Third: The government does not dispute that since Kahn was dismissed from Counts 8, 9, 10 and 11 (involving the dramatic nighttime withdrawal of $991,900.00 from Leyden Savings and Loan Association), Kahn could have been questioned at a separate trial

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1. The government erroneously poses the question presented in our case as being whether the trial court "*abused its discretion*" in denying a severance (Gov. Br. p. 2; emphasis added.) The government also begins its argument by saying that petitioners Sachs and Curran "*now* argue" that denial of a severance from Kahn violated their Sixth Amendment rights (*id.* at p. 4; emphasis added). Throughout this litigation, we have presented the severance issue as a constitutional question under the Sixth Amendment (as well as a question of construction of Rule 14, F. R. Crim. P.). The government cannot evade this important constitutional issue by disguising it under the talismanic label of "discretion." By assuming that the trial judge may exercise discretion and choose between the Fifth Amendment rights of one defendant and the Sixth Amendment rights of another defendant because of alleged inconvenience, the government is asking the Court to tolerate a continuing and needless conflict between two Amendments of equal importance. (See our Petition at pp. 1-2, 10.)

by Sachs and Curran concerning this critically important transaction (our Petition pp. 5-6, 9, n. 5); nor does the government deny that Kahn was the central figure in *all* the transactions involved and that he was the *only* witness having personal and first-hand knowledge of all the facts who was not called to the witness stand.[2]

Fourth: The government does not dispute that severance was denied only upon the prosecution's unsupported and general allegation of "inconvenience," and that *no* special reasons were presented for denying separate trials (see our Petition at pp. 17-20).

We submit that these undisputed facts, standing alone, compellingly justify the granting of full review of Sachs' and Curran's petition on the merits.

We turn to the arguments that the government does make in opposing the writ:

I. THE GOVERNMENT'S POSITION THAT SEVERANCE WAS UNNECESSARY IS ENTIRELY SPECULATIVE AND WITHOUT MERIT.

The government's brief nowhere suggests any reason to support the trial court's denial of severance, other than general inconvenience. See *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580, 595 (discussed in our Petition at p. 19). The government simply argues that the unexplained denial *may have been* non-prejudicial to Sachs and Curran. This contention is based upon a series of purely speculative and unsupported assumptions.

---

2. The government also does not dispute that Sachs and Curran received *none* of the proceeds of any of the loans questioned in the indictment.

The government speculates that Kahn might not have been willing to testify on petitioners' behalf at a separate trial (Gov. Br. p. 6). It is equally possible, however, that he would have been willing; it is also unquestionable that he could have been *compelled* to testify on all *non*-incriminating subjects (particularly the night-time withdrawal from Leyden—covered in Counts 8, 9, 10 and 11 on which Sachs alone stood trial—when neither Sachs nor Curran was present; see our petition, pp. 5-6, 9, n. 5). Moreover, if the trial of Sachs and Curran followed that of Kahn, Kahn in all likelihood could have been compelled to testify as to all of the transactions involved.

The government likewise speculates that if Kahn refused to testify at a separate trial, it is questionable "whether an inference could be legitimately drawn from a co-indictee's desire to stand on his privilege." (Gov. Br., p. 7.) The government cites absolutely no authority to support its negative answer to this question. We have cited substantial authority, including the unequivocal requirement of the Fifth Circuit in the *de Luna* case, to support our affirmative answer (see our Petition at p. 10, n. 6, and p. 12). Regardless of the answer that this Court finally adopts, the problem is an important and recurring question forcefully raised in this case.[3]

In addition, the government speculates that Kahn might not have given testimony favorable to Sachs and Curran because their "involvement was not a matter peculiarly within Kahn's knowledge" (Gov. Br., p. 5). This specula-

3. Still another government speculation concerning the right to comment is whether or not the defendants Sachs and Curran would have derived any benefit from contrasting to the jury their willingness to testify and Kahn's silence (Gov. Br., p. 9). The argument hardly seems worthy of refutation for any one experienced in the trial of cases is keenly aware of the benefit that would so be obtained by Sachs and Curran (our Petition, p. 10, n. 6).

tion is simply not the fact. Kahn was the principal and the prime mover in all the transactions on trial; Kahn received all the proceeds and benefits, and he and his employees (not Sachs and Curran) arranged many if not most of the necessary steps to execute the loans in question. No witness was in a better position to testify as to the exact truth concerning Sachs' and Curran's defense of innocence than Kahn. In the last analysis, the government's conjecture that Kahn would not have given testimony favorable to Sachs and Curran is at war with common sense; a defendant would hardly insist upon calling a co-defendant that he knows will give *unfavorable* testimony.

The government's *ad hominem* speculations concerning prejudice are not only unfounded but, we think, clearly demonstrate the necessity of the severance rule that we propose. Indeed, the purpose of the rule we urge is to avoid exactly the sort of speculative argument indulged in by the government as to what might or might not have occurred if the petitioners had been afforded their Sixth Amendment rights. Surely, the safeguarding of constitutional rights should not rest upon conjectures and surmises so frail and unrealistic as those offered here. And signally, the government's series of speculations to show no prejudice fly in the face of this Court's rationale in *Chapman* v. *California*, 386 U. S. 18 (1967), requiring the prosecution to prove *beyond a reasonable doubt* that a denial of constitutional rights is not prejudicial.

II. THE GOVERNMENT HAS SHOWN NO VALID DISTINCTIONS BETWEEN THIS CASE AND THE WASHINGTON AND DE LUNA CASES.

The government seeks to distinguish *Washington* v. *Texas*, 388 U. S. 14 (1967) and *de Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962) on essentially the same ground: those two cases each involved only two people

accused of a single isolated act. In *de Luna*, the only "factual issue" was "which of two occupants of an automobile had knowingly possessed the narcotics thrown from the car's window;" (Gov. Br. p. 7) and in *Washington*, the only factual issue was who had fired the fatal shot. The attempted distinction suggests that severance should be required only where the alleged crime consists of one isolated act and the defenses are mutually exclusive.[4]

The government's suggested rule would entirely exclude complex and multiphased transactions involved in this, and many other, federal criminal prosecutions. Indeed, as the Court has repeatedly recognized, the dangers of prejudice because of joint prosecution multiply as the complexity of the charged offenses increases. *Grunewald* v. *United States*, 353 U. S. 391, 404-05; *Krulewitch* v. *United States*, 336 U. S. 440, 445-58 (Jackson, *J.*, concurring); *Delli Paoli* v. *United States*, 352 U. S. 232, 246-48 (Frankfurter, *J.*, dissenting). It would be ironic if this Court were to condone a rule limiting severance to the simple case where two defendants are each blaming the other for a single charged act, and precluding severance in those cases that have been the principal source of concern. Moreover, as we pointed out in our Petition, the requirements of the Seventh Circuit's decision below:

> "are themselves mutually exclusive and contradictory, when judged from any realistic or practical standpoint. It would be the extremely rare—if not unheard of—case where co-defendants throw the *whole blame* on each other, and yet one obliges the other with a pretrial statement *absolving* the other from blame." (p. 16.)

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4. The Seventh Circuit's decision below adds still another requirement, *i.e.*, that proof be adduced that the co-defendant will give exculpatory testimony at a separate trial (Petition, pp. 16-17).

A rule so restricting severance plainly does not satisfy current day standards of even-handed criminal justice.

The government also tries to discount the clear conflict between this case and *de Luna* by asserting that the conflicting portions of *de Luna* are "clearly dictum" (Gov. Br. p. 8). This is simply not so and is merely another way of saying that the government disagrees with the *de Luna* case. As pointed out in our petition, the only difference between *de Luna* and this case is the procedural posture in which each case came before the Court of Appeals. In *de Luna* the non-testifying defendant's rights had been violated by allowing comment to the jury on his refusal to testify; here the rights of the testifying defendants (Sachs and Curran) were violated because they could not summon Kahn at the joint trial, examine him, and comment to the jury on any refusal to testify (see our Petition, p. 13, n. 10).

The conflict between this case and *de Luna* can best be demonstrated by asking what each Court of Appeals would have done in the other's case. It is demonstrably clear that in the instant case the Fifth Circuit would have required separate trials; the Court explicitly so declared in the *de Luna* opinion:

> "And considering the case from Gomez's point of view [Gomez, like Sachs and Curran, testified] his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. *Gomez has rights as well as de Luna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from de Luna's absence from the stand.*" (308 F. 2d at 143; emphasis added.)

By the same token, it is equally clear that the Seventh Circuit would have denied a severance in the *de Luna* case. Although the defenses in *de Luna* were "mutually exclusive," the second requirement of the Seventh Circuit was not met, *i.e.*, there was no showing that the non-testifying defendant would give testimony exculpating the co-defendant at a separate trial (the ground on which the Seventh Circuit distinguished *United States* v. *Echeles*, 352 F. 2d 892; our Petition, p. 16, n. 11). Moreover, the Seventh Circuit emphatically rejected, on alleged grounds of general inconvenience to the government, the Fifth Circuit's declared rule that "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, *the trial judge's duty is to order that the defendants be tried separately.*" (308 F. 2d at 141; emphasis added.) (Our Petition, pp. 12-13.)

Finally, the government's attempt to relegate the *de Luna* severance requirement to "dictum" is indefensible in light of the fact that a number of other courts (in conflict with the Seventh Circuit) are following the announced rule of *de Luna* and are requiring severance [*e.g.*, *People* v. *Hannon*, 50 Misc. 2d 297, 270 N. Y. S. 2d 327 (1966), and District Courts in the Fifth Circuit; our Petition, pp. 13-15]. In sum, it is plain that until this Court resolves the matter co-defendants in the various circuit, district and state courts will receive different severance treatment upon identical facts.

III. THE GOVERNMENT HAS ERRONEOUSLY PORTRAYED THE RECORD.

In two important instances the government's brief misreads the record. The government intimates (for the first time) that petitioners' severance claim may have been waived by the following statement of their trial counsel:

> "Your Honor, in connection with this question of the severance, in a memorandum which we filed in which we discussed the Echles [sic] case, I indicated the possibility that we might call Mr. Kahn; I said that we would take it up in advance.
>
> "I want to say that we have decided that that will not be done so that particular question will not arise." Gov. Br. pp. 5-6; C. A. 7 (App. 328.)[5]

Prior to this statement of counsel, and during the trial, the District Judge had denied a renewed motion for severance by Sachs and Curran—made by petitioners *after* Kahn had reaffirmed that he would not take the stand (Tr. 2121-22). As a corollary to the renewed request for severance, petitioners argued that at minimum they should be able to comment to the jury concerning Kahn's failure to testify.

When the District Court denied the petitioners' renewed motion for severance, it was then obvious to petitioners' counsel that because of the Fifth Amendment he could not possibly call Kahn in front of the jury, and hence the quoted statement at that time, "I want to say that we have decided that that will not be done so that particular question will not arise." Thereafter, counsel only pressed his corollary request, *i.e.*, the right to comment on Kahn's silence. The remaining portions of the colloquy—not quoted by the government—make it plain that counsel was respectfully acknowledging the reality of the court's denial

5. The government made no mention whatsoever of this statement in either the District Court or the Court of Appeals.

of severance and was attempting to press the right to comment concerning Kahn.[6] This request was also denied.

The government also misreads the record in claiming that damaging testimony was adduced from independent witnesses against Sachs and Curran; the government's brief represents that there was "a state examiner who told

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6. "There is still something that remains, your Honor, a question which we can discuss at any time the Court cares to of my using a reference to testimony by my defendants, but I just want to say this.

"The Court: Well, the reference will be what?

"Mr. Kirby: Well, the reference would simply be that my defendants testified, my defendants gave their full story, my defendants exposed themselves to the full rigors of an extensive cross-examination, and that Mr. Kahn did not.

"The Court: Well, at that point, this is where I am not going to permit you to make any such reference to Mr. Kahn and I am going to be very explicit on it, and at the time that you begin your final argument it will be made very clear to you that any such reference will not be made and should not be made and you may make any such offer that you want to in advance of the argument, but you—you may refer to the fact that your clients have testified and told their version of the story, but any reference whatever to the fact that Mr. Kahn did not take the stand will be improper, and would be improper, and should not be made. I want that very clear.

"I, of course, expect you, as an officer of the Court, to abide by the Court's ruling.

"Mr. Kirby: Well, your Honor has had the memoranda.

"The Court: I have had it and considered it.

"Mr. Kirby: You have considered it.

"The Court: I have considered it fully.

"Mr. Kirby: This is your ruling.

"The Court: Yes.

"Mr. Kirby: I assure you I will abide by it.

"The Court: I am sure you will.

"Mr. Kirby: It does not need to again be brought up.

"The Court: No.

"Mr. Kirby: Before the start of the arguments. *Our objection to the restriction can be noted at this time.*" (C. A. 7 App. 328-29; emphasis added.)

of incriminating statements by Sachs (Tr. 449-458)." (Gov. Br. p. 5.) (The purpose of this statement by the government is not apparent since sufficiency of the evidence is not at issue here.) An examination of the cited pages of the trial transcript reveals that the government's representation is simply not true. The "state examiner," Mr. Waggoner, did *not* testify that Sachs had made any incriminating statements.[7]

IV. THE WRIT SHOULD BE GRANTED SO THAT THIS CASE MAY BE CONSIDERED TOGETHER WITH BRUTON v. UNITED STATES, NO. 705.

After the printing of our Petition for certiorari the Court granted certiorari in two related cases: *Bruton* v. *United States,* No. 705 and *Garner* v. *Yeager,* No. 704. Both of these cases raised the issue of whether at the joint trial of two defendants, the trial court may receive in evidence the confession of one defendant that incriminates the co-defendant. The Court is thus being asked to reconsider its 5-4 decision in *Delli Paoli* v. *United States,* 352 U. S. 232 (1957). On November 6, 1967, the Court summarily reversed and remanded the *Garner* case for

7. Quite the contrary, Mr. Waggoner testified:

"Q. What if anything else was said by any of the parties about that?

"A. Well, Mr. Sachs said he knew nothing about this loan to Ferrari and knew nothing about the $155,000 loan.

"Although I tried to convince him that we had found that the proceeds had gone into a cashier's check to him, he denied having any knowledge of it in that meeting.

"So, I left that point as it was in that conversation." (Tr. 454.)

Mr. Waggoner also testified that Sachs told him he was not interested financially in the loan to Sandy Building Corp., a fact that the government has never disputed (Tr. 453). Nowhere did Mr. Waggoner testify as to any "incriminating statements by Sachs."

reconsideration in light of a recent decision of the New Jersey Supreme Court on another issue in the case unrelated to *Delli Paoli*—thus leaving *Bruton,* No. 705, as the sole case in which the *Delli Paoli* severance problem will be argued and decided.

The severance question presented in our case is closely related to, and is in fact the converse of, the question to be considered in *Bruton.* Petitioners Sachs and Curran sought a separate trial from their co-defendant Kahn in order to *introduce,* rather than exclude, relevant evidence, *i.e.,* the testimony of Kahn who had unique first-hand knowledge of all the facts. By being denied a severance, Sachs and Curran lost their rights of compulsory process under the Sixth Amendment (see our Petition, pp. 8-12).

We respectfully submit that it would be most useful for the Court to consider these related aspects of the severance problem together, since they raise several problems in common that are of grave and recurring importance. For example: How likely should it appear that a defendant will be prejudiced by a joint trial before a severance is required? What basic standards or guidelines should trial courts follow in exercising their discretion with regard to motions for severance? How much, if any, weight should be afforded a prosecution claim of general inconvenience as a reason for denying severance? [The inter-connection of the *Delli Paoli* severance problem with petitioners' dilemma is delineated in the recent California Supreme Court decision requiring severance in *People* v. *Massie,* 59 Cal. Rep. 733, 428 P. 2d 869 at 886 (1967).]

There are, to be sure, some differences between the factual context of our case and that of *Bruton;* but we believe these differences reflect an even greater necessity for the Court to review our case together with *Bruton:*

(1) In our case, there is a conflict between the

Seventh and Fifth Circuits (as well as many state and lower federal courts) (our Petition, pages 12-16); in *Bruton*, the only Circuit that is out of line is the District of Columbia Circuit that is acting "in the exercise of its special power to make rules for that Circuit . . ." (Memorandum for the Government in *Bruton* v. *U. S.* at page 7, note 5).

(2) In our case, the courts have created a head-on, but unnecessary, conflict between two important Constitutional rights (the Fifth and Sixth Amendments); in the *Bruton* case only one such right is involved.

(3) In our case, this Court has never considered the issue raised; in *Bruton*, the Court did specifically consider the issue once before in *Delli Paoli* in 1957.

(4) In the *Bruton* type of case, the trial judge is in a position to evaluate the prejudice allegedly resulting from introduction of the challenged evidence, since he knows precisely what the evidence is (i.e., a confession); in our type of case, the trial judge can only guess as to what prejudice will result from the exclusion of allegedly exculpatory evidence, since he has no way of knowing what the evidence may consist of.

All of the above reasons highlight the need for a definitive resolution of the question in our petition together with the question to be decided in *Bruton*. We shall, of course, conform to any briefing schedule that the Court sets so that *Bruton* and this case can be heard on the merits together.

CONCLUSION.

For the foregoing reasons, in addition to those presented in our Petition, we submit that Sachs' and Curran's Petition for certiorari should be granted.

Respectfully submitted,

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November 21, 1967.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 28 1967
JOHN F. DAVIS, CLERK

No. 718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ARTHUR B. SACHS AND M. PRIAL CURRAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

WILLIAM T. KIRBY,
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Chicago, Illinois,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

Petitioners respectfully pray that this Court grant rehearing of its order of December 18, 1967, denying the petition for a writ of certiorari in this cause. Petitioners desire to bring to the attention of the Court a substantial ground not previously presented. Rule 58(2), Revised Rules of the Supreme Court of the United States.

REASONS FOR GRANTING REHEARING.

Petitioners have cause to believe that Government agents may have engaged in unconstitutional wiretapping and eavesdropping in connection with their case. The facts and circumstances underlying this belief are set forth in a

letter from petitioners' counsel to the Attorney General dated November 8, 1967, reproduced in Appendix A hereto. The letter sought the Attorney General's "assistance in determining whether the criminal trial of [Sachs and Curran] was tainted by illegal wiretapping and/or eavesdropping carried out by federal agents." The letter added that counsel "have no way of knowing whether Mr. Sachs' offices or phones were, in fact, 'bugged.' We are therefore asking your assistance in determining whether this did occur."

On November 22, 1967, Assistant Attorney General Vinson replied on behalf of the Attorney General; a copy of his letter appears in Appendix B hereto. Mr. Vinson did not say whether any wiretapping or eavesdropping had in fact occurred. Instead, he stated that it was the policy of the Justice Department, pursuant to its memorandum on rehearing of *Schipani* v. *United States*, No. 504, 1966 Term, to notify the appropriate court "when any *material* discovery is made" (emphasis added). He concluded that "our inquiry has produced no information *within the scope* of *Schipani* v. *United States*." (Emphasis added.)

This reply left open the real possibility that wiretapping and/or eavesdropping did, in fact, occur, but that in the opinion of the Justice Department such intrusions did not "materially" affect petitioners' case. Accordingly, counsel for petitioners wrote to Mr. Vinson on December 1, 1967, stating that his letter of November 22, 1967, was not responsive to the original inquiry of "whether any electronic surveillance or other such eavesdropping did in fact occur in this case." This letter is reproduced in Appendix C hereto. To date, no reply from the Assistant Attorney General has been received.[1]

1. In the letter of December 1, 1967, counsel for petitioners requested a "response as promptly as possible because, as you know, my clients' petition for a writ of certiorari . . . is now pending in the Supreme Court. . . ."

Petitioners are not satisfied and respectfully submit that this Court should not be satisfied either. There remains the substantial possibility that the Government did engage in unconstitutional wiretapping and eavesdropping, and that the Justice Department has concluded, *ex parte*, that these intrusions did not "materially" affect the case.

This Court has, in the past, been unwilling to rely on similar judgments by the prosecuting arm of the Government. In *Hoffa* v. *United States*, 387 U. S. 231 (1967) the Solicitor General informed the Court that "conversation between petitioner Burris and one Benjamin Sigelbaum" was overheard as a result of electronic eavesdropping. The Solicitor General assured the Court, however, that "the information obtained through this electronic eavesdropping was not introduced into evidence at trial, that it was never the basis of any investigative lead, and that it was in part already known, through Burris' own statements, to government attorneys." The Solicitor General also contended that any judicial inquiry should be "confined to the conviction of Burris" and not extended to the other petitioners in the case.

The Court rejected these contentions. It said that "We consider it more appropriate that each of these petitioners be provided an opportunity to establish, if he can, that the interception of this particular conversation, or of other conversations, vitiated in some manner his conviction." (387 U. S. at 233.) This is as it must be in an adversary system of justice; the prosecution should not be empowered to finally determine whether information materially affected a case. Counsel for petitioners must be afforded an opportunity to determine this for themselves and, if the facts warrant, to argue that the information may have had a material effect.

Petitioners request this Court to follow a procedure similar to that established in *Hoffa* v. *United States, supra.*

We respectfully ask the Court to inquire of the Solicitor General whether the Government engaged in *any* wiretapping or eavesdropping in connection with this case. See *Black* v. *United States,* 384 U. S. 983 (1966). If the Solicitor General states that it did, the "appropriate procedure" would be:

> "to remand the case to the District Court for a hearing, findings, and conclusions on the nature and relevance to these convictions of the recorded conversation, and of any other conversations that may be shown to have been overheard through similar eavesdropping." *Hoffa* v. *United States, supra,* p. 233.

Moreover, if the Solicitor General informs this Court that the government overheard *any* conversations between petitioners *and their attorneys,* then the Court would have "adequate justification" for holding that "a new trial must be held." *Black* v. *United States,* 384 U. S. 983 (1966); *O'Brien* v. *United States,* 384 U. S. 986 (1967).

The issue raised in this petition for rehearing is identical, in all legal respects, to that raised in *Kolod, Alderman and Alderisio* v. *United States,* No. 133, and we refer the Court to the arguments made and authorities cited therein (especially at pages 4 to 11). In that case, the Court requested the Solicitor General to file a response, see 36 Law Week 3226 (December 4, 1967). We respectfully ask the Court to make the same request here.[2]

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2. In the *Kolod* case, Mr. Justice White, on October 17, 1967, granted petitioners' motion to suspend the order of denial of certiorari pending filing and disposition of a petition for rehearing. We have made a similar motion which—at the time of the preparation of this petition—has not yet been decided.

CONCLUSION.

For the reasons set forth above, it is respectfully urged that rehearing be granted of the Order of December 18, 1967, denying the petition for a writ of certiorari.

Respectfully submitted,

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Langdell Hall,
Cambridge, Massachusetts,

Attorneys for Petitioners.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

Counsel for Petitioner.

APPENDIX A.

November 8, 1967.

The Honorable Ramsey Clark,
Attorney General,
Department of Justice,
Washington, D. C.

DEAR GENERAL CLARK:

I am writing to seek your assistance in determining whether the criminal trial of my clients was tainted by illegal wiretapping and/or eavesdropping carried on by federal agents.

My clients, Messrs. Arthur B. Sachs and M. Prial Curran, are attorneys who were indicted in 1964 for several federal offenses. Their conviction was sustained by the Seventh Circuit Court of Appeals on September 12, 1967 and a Petition for Certiorari is now pending. None of the alleged crimes in any way involved the national security. Since they are both lawyers, Messrs. Sachs and Curran took an active part in their defense, and from that time to the present they have participated in many meetings and telephone calls concerning their trial and the subsequent appeal. Much of this activity, including several conferences with counsel, took place in Mr. Sachs' office at One North LaSalle Street, in Chicago. Mr. Sachs recently informed me that he had reason to suspect that his phones may have been tapped and that a listening device may have been installed in his office. On a Saturday night in March or April, 1966, he recalls noticing his office clock (an Atmos clock manufactured by Le Coultre) running normally. On

the following Monday morning, he saw that the clock had stopped and he thought he noticed some slight differences between his clock and the one on the table. Upon checking with the Le Coultre Company, he learned that the clock then on his table had a serial number which indicated that it was manufactured after the time when Mr. Sachs obtained his clock. He suspects, therefore, that his clock may have been used to conceal a listening device and was removed and replaced with another one. He also claims that he heard strange noises in his home and office phones, State 2-8300 on Extensions 30, 31, 41, 42, 45 and 46, and Sycamore 8-2793.

We, of course, have no way of knowing whether Mr. Sachs' offices or phones were, in fact, "bugged." We are, therefore, asking your assistance in determining whether this did occur. If federal surveillance of the sort suggested by this evidence was in fact carried out, it evidently threatened my clients' right to enjoy the benefit of counsel and to be protected against unconstitutional eavesdropping and illegal wiretapping, and it also violated President Johnson's eavesdropping directive of 1965, and the principles of your memorandum of July 6, 1967.

As you have said, the Justice Department "must never proceed with any investigation or case which includes evidence illegally obtained or the fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint or unfairness." *N. Y. Times*, Dec. 1, 1966, at 1, 32. The Solicitor General's Supplementary Memorandum in the *Schipani* case, 385 U. S. 372 (1967), informed the Supreme Court that the Justice Department has initiated "an extensive review . . . in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial." I

would much appreciate if, as part of this review, you could investigate my clients' claim and inform me whether surveillance devices were used.

Thank you for your cooperation.

Very truly yours,

/s/ DON H. REUBEN.
DON H. REUBEN.

DHR/clf

APPENDIX B.

(Stamp) Received Nov 27 1967 D. H. R.

Assistant Attorney General
Criminal Division

DEPARTMENT OF JUSTICE
Washington 20530

November 22, 1967.

Mr. Don H. Reuben,
Kirkland, Ellis, Hodson,
Chaffetz & Masters,
Prudential Plaza,
Chicago, Illinois.

DEAR MR. REUBEN:

The Attorney General has asked me to reply to your letter dated November 8, 1967, relating to the conviction of your clients, Arthur B. Sachs and M. Prial Curran in the Northern District of Illinois for violations of Sections 371, 656, 657 and 1006, Title 18 United States Code.

In *Schipani* v. *United States,* Docket No. 504, Supreme Court, 1966 Term, the United States advised the court that an extensive review had been undertaken by the Department of Justice in order to determine the instances in which there might have been electronic monitoring affecting a case which had been brought to trial and that it was the policy of the Department promptly to notify the appropriate court when any material discovery is made. That review procedure was undertaken with regard to this case and no notification has been made because our inquiry has produced no information within the scope of *Schipani* v. *United States.*

Sincerely,

/s/ FRED M. VINSON, JR.
FRED M. VINSON, JR.
Assistant Attorney General.

APPENDIX C.

December 1, 1967.

The Honorable Fred M. Vinson, Jr.,
Assistant Attorney General,
Criminal Division,
Department of Justice,
Washington, D. C. 20530.

Re: United States v. Arthur
B. Sachs and M. Prial
Curran, N. D. Ill.

DEAR MR. VINSON:

I have and thank you for your letter of November 22, 1967.

In my original letter to the Attorney General dated November 8, 1967, I inquired whether any surveillance by electronic listening devices or similar means had in fact been conducted by the Government in connection with the above-named case. You have responded in your letter that it is the policy of the Justice Department (as announced in the Government's Memorandum on rehearing of *Schipani* v. *United States*) to conduct an "extensive review" of criminal prosecutions in which there "might have been electronic monitoring affecting a case," and to notify the appropriate court "when any material discovery is made." Your letter further states that this review procedure was undertaken in this case and "no notification has been made because our inquiry has produced no information within the scope of *Schipani* v. *United States*."

I do not believe that your letter answers my original inquiry, *i.e.*, whether any electronic surveillance or other such eavesdropping did in fact occur in this case. If it did, I believe that the defendants and their counsel are clearly entitled to know that fact and to receive a full opportunity to make an independent appraisal and evaluation of whether the surveillance and its fruits were "material" or in any way "affected" the case. (*United States* v. *Coplon*, 185 F. 2d 629, 636-39 (2nd Cir.), cert. denied, 342 U. S. 920.) Only in this manner can there by satisfactory and concrete assurance that the investigation and prosecution of the case was without "taint or unfairness." (Memorandum for the Government on rehearing of *Schipani* v. *United States*.)

I therefore respectfully request a more definite and complete response to my inquiry. I request your response as promptly as possible because, as you know, my clients' petition for a writ of certiorari to review their convictions is now pending in the Supreme Court (No. 718).

Very truly yours,

/s/ DON H. REUBEN.
DON H. REUBEN.

DHR/clf

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 718

ARTHUR B. SACHS AND M. PRIAL CURRAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING

On December 18, 1967, this Court denied a writ of certiorari herein. Petitioners sought rehearing, and on January 15, 1968, this Court requested that the government reply to the petition for rehearing.

Petitioners state that they support the arguments advanced by petitioners in *Kolod et al.* v. *United States,* No. 133. They further request the Court "to inquire of the Solicitor General whether the Government engaged in *any* wiretapping or eavesdropping" in connection with the instant case.

The policy followed by the government in disclosing to the courts instances of electronic surveillance has

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been set forth in the memorandum filed by the United States in No. 133. That policy, however, never came into play in the instant case. The Solicitor General is advised that this Department has no information indicating that these petitioners were at any time the subject of wiretapping or eavesdropping.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ARTHUR B. SACHS AND M. PRIAL CURRAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO THE SOLICITOR GENERAL'S MEMORANDUM IN OPPOSITION.

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In their petition for rehearing, petitioners stated that they "have cause to believe that Government agents may have engaged in unconstitutional wiretapping and eavesdropping in connection with their case" (p. 1).[1] The Solicitor General, after being requested to file a response to that petition, says that he "is advised that this department has no information indicating that these petitioners were at any time the subject of wiretapping or eavesdropping" (p. 2). The Solicitor General does not say, however, who has so "advised" him and on the basis of how extensive an investigation. Did his advisor simply look at the Justice

1. The sources of this belief were detailed in Appendix A to the petition.

Department file and conclude that "this Department has no information indicating" such activity? Did he simply ask someone in the Federal Bureau of Investigation? Or did he conduct an independent and thorough investigation of his own?[2]

There is some disturbing evidence that those who engage in wiretapping and eavesdropping sometimes conceal this information from their superiors in the Department of Justice.[3] In light of this, petitioners cannot be satisfied, nor should this Court be satisfied, that what the Solicitor General has been "advised," is necessarily an entirely accurate and complete reflection of the real situation. Accordingly, this Court should remand the case to the District Court for a judicial hearing to determine whether the government did, in fact, engage in any proscribed wiretapping or eavesdropping. Such a hearing will subject the Department's ex parte determination of "no information" to the truth-testing aspects of an adversary process.

In *Kolod* v. *United States*, 36 L. W. 3306, the Solicitor General made an ex parte determination that certain information "was not arguably relevant to that prosecution." This Court held, however, that "we cannot accept the

2. The promptness with which the Solicitor General filed his Memorandum in Opposition is enough to raise some question about the extent of the investigation. Moreover, the Solicitor General's Memorandum was filed before this Court's decision in the *Kolod* case, see note 2 *infra*.

3. See Petition for Rehearing and Motion for Disclosure of Electronic Surveillance in *Kolod, Alderman and Alderisio* v. *United States*, granted on Jan. 29, 1968, 36 L. W. 3306. That petition cites evidence that "clearly reveals that the Department may have trouble getting its own agents to own up to illegality" (p. 10, note 5 and Appendix A). Among the materials cited were the *Nesline* case which "uncovered a large-scale FBI effort to conceal from government counsel and the courts the existence and nature of electronic surveillance in federal criminal cases," see *id.* at 2a-3a. The petition also cited the *McGarry* case (p. 3A) in which a government agent apparently erased tapes and misinformed his superiors in an attempt to conceal wiretapping.

Department's ex parte determination of relevancy in lieu of such determination in an adversary proceeding in the District Court." *Id.* at 3307. How then can this Court "accept the Department's ex parte determination" that the "Solicitor General is advised that this Department has no information indicating that these petitioners were at any time the subject of wiretapping or eavesdropping." Indeed, the Solicitor General, being an experienced lawyer, but not an experienced investigator, is in a much better position to determine whether an existing item of evidence is or is not "arguably relevant," than he is to determine whether certain evidence does or does not exist.

Further, the "Memorandum in Opposition" is limited to whether there was wiretapping or eavesdropping of which "these petitioners were . . . the subject . . ." (p. 2). The investigation (relating to one bank and four savings and loan associations) plainly involved more than "these petitioners," for there were two additional persons indicted: S. Lawrence Kahn and Thomas Joyce and two more persons named as conspirators, but not as defendants, Ferrari and Burleson. We are not told whether any of the six (except "these petitioners") were "the subject of wiretapping or eavesdropping" though such occurrences might well affect these petitioners just as surely as if petitioners were "the subject" aimed at by any placement of an electronic device.

In *Hoffa* v. *United States*, 387 U. S. 231 (1967), this Court learned that the government had overheard a conversation between one of the defendants [Burris] and a third party. The Solicitor General advised the Court that the recording was only "peripherally relevant to the charges underlying [Burris'] conviction," and he urged the Court to limit any inquiry to the effect of the wiretapping on that defendant alone. But the Court said: "We consider it more appropriate that each of these petitioners be provided an oppor-

tunity to establish, if he can, that the interception of this particular conversation, or of other conversations, vitiated in some manner his conviction." *Id.* at 233. Accordingly, this Court should not be satisfied with a statement that "these petitioners were not the subject of wiretapping or eavesdropping."

Petitioners respectfully request this Court, therefore, to grant the petitions for rehearing and for certiorari, "vacate the judgment of the Court of Appeals, and remand the case to the District Court for a hearing, findings and conclusions," see *Kolod* v. *United States, ibid.*, as to whether any proscribed wiretapping or eavesdropping did, in fact, occur.

Respectfully submitted,

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